83-173

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

MILTON R. WASMAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether a sentence may be enhanced following re-trial and re-conviction after a first conviction is reversed on appeal based upon conduct of a defendant which occurred prior to the first sentencing hearing?

LIST OF INTERESTED PERSONS

The only persons having an interest in the outcome of this case are the Petitioner, his family, and the United States of America.

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NO.

IN THE
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MILTON R. WASMAN,
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vs.

UNITED STATES OF AMERICA,
Respondent.

Petitioner, MILTON R. WASMAN, respectfully prays that a Writ of Certiorari issue to review the judgment, opinion, and order of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on March 17, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals is reproduced in the Appendix attached hereto and is reported as United States v. Wasman, 700 F.2d 663 (11th Cir. 1983). A petition for re-hearing and/or suggestion for re-hearing en banc was rejected on June 2, 1983, and a copy of the rejection is included in the Appendix. A copy of the transcript of the sentencing hearing in the district court (the subject of the issue presented for review) is also contained in the Appendix.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The judgment from which review is sought was rendered March 17, 1983. An order denying re-hearing was entered June 2,1983. Thus, this petition is timely filed.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment V:

> No person shall...be deprived of...liberty...without due process of law....

STATEMENT OF THE CASE

COURSE OF PROCEEDINGS

Petitioner, MILTON R. WASMAN, was charged by a Federal Grand Jury in the Southern District of Florida in a one count indictment with wilfully and knowingly making false statements in an application for a passport with the intent to induce and secure the issuance of a passport in violation of 18 U.S.C. §1542.

The case went to trial in September of 1979 and the Petitioner was found guilty as charged. He was sentenced to two (2) years incarceration but pursuant to the split sentencing provision of 18 U.S.C. §3651, whereby the sentence was to run as follows: the Petitioner would serve a period of six (6) months confinement thereafter the remainder of the sentence of confinement would be suspended and he would be placed on three (3) years probation.

The Petitioner's appeal from that sentence resulted in the reversal of that prior judgment of conviction and a remand for a new trial. United States v. Wasman, 641 F.2d 326 (5th Cir.1981).

The case was again called for trial in July of 1981 and a jury again found the Petitioner guilty. In August of 1981 he was sentenced to two years incarceration.

Following a denial of a motion to stay the issuance of the mandate in the Eleventh Circuit, an application for stay was filed in this Court. On June 27, 1983, Justice Lewis F. Powell granted that application. A copy of Justice Powell's Order is included in the Appendix.

STATEMENT OF NECESSARY FACTS

1.) The Charge

The indictment charged that

on or about March 1, 1978, the Petitioner wilfully and knowingly made a false statement on an application for a passport, in that the Petitioner, MILTON WASMAN, applied for a passport representing that his name was David Hibbert Hendrick, Jr., born September 12, 1914, Knoxville, Pennsylvania, and that a photograph of himself was that of Hendrick, knowing that such statements and representations were false. There was never really any dispute as to the fact that the Petitioner obtained a passport in the name of Hendrick, a deceased law school classmate. The dispute carried on through two trials and appeals related to intent and the reasons of the Petitioner.[1]

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[1] See proffer set out in the first Wasman case, United States v. Wasman, 641 F.2d 326,328 (5th Cir.1981) and the background section of the second opinion. United States v. Wasman, 700 F.2d 663,665 (11th Cir.1983)(App. p.A 4-7)

2.) The Enhanced Sentence

Following his first conviction, the Petitioner was sentenced to two (2) years incarceration, but pursuant to the split sentence provision of 18 U.S.C. §3651, whereby he was to serve six months incarceration and then be placed on three (3) years probation. From that conviction and sentence, WASMAN appealed.

While his appeal was pending in the Fifth Circuit, the Petitioner entered a plea of nolo contendere to a misdemeanor charge of possession of false certificates of deposit [18 U.S.C. §480]. That plea, also entered consistent with the rationale of North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160(1970), was a negotiated one, whereby the Government dismissed a mail fraud indictment in return for the misdemeanor

nolo plea. That mail fraud indictment had been pending at the time of the Petitioner's sentencing in the passport case with the underlying facts having occurred a number of years earlier.

Following a lengthy sentencing hearing in the false certificates case in which it was noted that the charge to which the Petitioner had pled nolo contendere was interwoven with the facts of the "passport" case, the District Judge, taking into account the then pending passport conviction and sentence, imposed a sentence of two years probation.

Shortly after the sentencing hearing in the certificates misdemeanor case, the Fifth Circuit reversed the first passport case and remanded for a new trial. At that second trial, the Defendant was again convicted and on August 31, 1981 again appeared for sentencing. At that

hearing, the District Court enhanced WASMAN'S sentence to a straight two years incarceration with the announced basis for the enhancement being his plea of nolo contendere in the misdemeanor case. The transcript of the sentencing hearing is contained in the Appendix.

REASONS FOR GRANTING THE WRIT

ENHANCEMENT OF SENTENCE FOLLOWING RETRIAL AND CONVICTION CANNOT BE BASED UPON CONDUCT OCCURRING BEFORE THE FIRST SENTENCING HEARING

The issue presented for review is simply whether a trial judge may use, as a basis for enhancing a defendant's sentence following re-trial after a first conviction is reversed on appeal, conduct on the part of the defendant which occurred prior to the first sentencing hearing.[2]

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[2] Clearly, it is beyond dispute and in fact was conceded below that the sentence imposed upon the Petitioner following the second trial was an enhanced one over that previously imposed. See United States v. Williams, 651 F.2d 644, 647, (9th Cir. 1981); United States v. Gilliss, 645 F.2d 1269, 1283 (8th Cir. 1981); United States v. Markus, 603 F.2d 409 (2d Cir. 1979).

Any analysis of such an issue must begin with this Court's opinion in the case of North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072(1969). In Pearce, it was held that a trial judge is not constitutionally forbidden from imposing a more severe sentence upon a defendant who has successfully attacked a first conviction, but due process requires that vindictiveness against the defendant for exercising his appellate rights must play no part in that enhancement and that a defendant should be free of fear of vindictiveness that may otherwise deter him from taking an appeal. 395 U.S. at 723-725, 89 S.Ct. at 2079-2080. To insure such a result, this Court fashioned a prophylactic rule:

> [W]henever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. 395 U.S. at 726, 89 S.Ct. at 2081

In setting out such a rule, this Court was concerned not only that actual vindictiveness play no part in any re-sentencing process but also that a defendant should be able to decide whether to exercise his appellate rights free and unfettered from the apprehension that a trial judge would act with a retaliatory motive at any subsequent sentencing. North Carolina v. Pearce, 395 U.S. at 724-725, 89 S.Ct. at 2080.

In the instant case, the enhanced sentence, imposed for the reasons stated (App., p.A-33-67), clearly violates the Pearce rule. In enhancing the Petitioner's sentence (from a previously imposed six (6) months incarceration to two (2) years incarceration), the trial court looked to the intervening misdemeanor plea of nolo contendere to a charge of possessing false certificates of deposit. That plea was a negotiated one, whereby the Petitioner entered his plea and the Government dismissed a mail fraud indictment involving the same incident. That indictment was pending at the time of the first sentencing hearing in this case ("the passport case") and known to the sentencing judge. The charges in the false certificates case

involved conduct occurring in 1973, over six (6) years prior to the first sentencing hearing and approximately five (5) years prior even to the indictment in the instant case. The only relevant thing that occurred between the two sentencings in the passport case was that the mail fraud case was resolved when the Government dismissed the pending indictment and WASMAN pled nolo contendere to the misdemeanor information filed in its place, a plea given with the announcement that it was made consistent with North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160 (1975), that is, a plea entered as being in the overall best interest of the defendant.

The Petitioner submits that the use of the plea and sentence in the false

certificates case as the basis for enhancement of his sentence in the passport case was unquestionably improper and demands a remand for sentencing before a different judge, a position urged but rejected in the Eleventh Circuit. Both the Second and Ninth Circuits have found enhancement improper under similar circumstances and outside the guidelines set down by this Court in North Carolina v. Pearce, supra. See United States v. Markus, 603 F.2d 409 (2d Cir. 1979) and United States v. Williams, 651 F.2d 644(9th Cir.1981) respectively. In light of the split among the circuits on this important due process issue and the apparent clear violation by the Eleventh Circuit of the Pearce rule in the instant case, the Petitioner urges that this Court grant

the instant petition and review this issue.

Pearce and the logic behind it allows for enhancement based on conduct of the defendant, not on the resolution of that conduct in court. In Pearce, this Court chose to insure that a defendant would have no fear that a trial judge would retaliate against him for successfully bringing an appeal by "putting the ball in his lap." If he did anything improper between the first and second sentencing hearings, then the judge could take that into consideration on re-sentencing. Where, as here, the Petitioner did nothing other than resolve in court a pre-existing factual situation, enhancement based solely for that reason should not be permitted. If enhancement is to take place, it should

be due to actions of the defendant. If he does something new, he should "pay the price." Otherwise, if there is no identifiable conduct occurring after the time of the first sentencing, then things should return to the status quo at the time of the first sentencing.

In Blackledge v. Perry, 417 U.S. 21,28, 94 S.Ct. 2098, 2102(1974) this Court emphasized that fear of vindictiveness must be removed as well as vindictiveness itself. Further, in the recent case of United States v. Goodwin, _____U.S. ____,102 S.Ct. 2485 (1982), it was noted

> Both Pearce and Blackledge involved the defendant's exercise of a procedural right that caused a complete retrial after he had been once tried and convicted. The decisions in these cases reflect a recognition

> by the Court of the institutional bias inherent in the judicial system against the retrial of issues that have already been decided. The doctrines of stare decisis, res judicata, the law of the case and double jeopardy all are based, at least in part, on that deep-seated bias. While none of those doctrines barred the retrials in Pearce and Blackledge, the same institutional pressure that supports them might also subconsciously motivate a vindictive prosecutorial or judicial response to a defendant's exercise of his right to obtain a retrial of a decided question.
>
> 102 S.Ct. at 2490-2491

The concern about these possible subconscious reactions to retrials is another reason for the objective standard of Pearce, that is, to take subconscious motivation out of the picture. Otherwise, if he feels he could receive a harsher sentence without his doing anything more,

there is certainly a realistic likelihood that a defendant may be deterred in exercising his appellate rights, a situation that Pearce was designed to overcome. Blackledge v. Perry, 417 U.S. at 28, 94 S.Ct. at 2102. See also United States v. Monaco, 702 F.2d 860, 884 (11th Cir.1983).

In its opinion affirming the lower court, the Eleventh Circuit noted that there was no evidence that the enhancement given in this case resulted from actual vindictiveness on the part of the sentencing judge. United States, v. Wasman, 700 F.2d 663,668(11th Cir. 1983). Whether a trial judge acts out

of actual vindictiveness[3], or with a motive subconsciously derived from the reversal of the first trial (United States v. Goodwin, supra) ordinarily cannot definitely be determined. Because of this uncertainty, the objective test of Pearce, as followed by the Second Circuit in United States v. Markus, supra, and the Ninth Circuit in United States v. Williams, supra, is required to take fear

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[3] A review of the transcript of the sentencing hear-ng in this case (App. p.A-33-67) reveals strong negative feelings against the Petitioner. The trial judge appears to be displeased with the sentence given by the judge in the misdemeanor false certificates case and was acting essentially as a reviewing body. It is ironic that the enhancement of eighteen (18) months (two years v. six months given the first time) was more than the maximum allowable sentence for the false certificate case itself.

of vindictiveness out of the process altogether.[4]

A major concern of the Eleventh Circuit, both in terms of the facts of this case and as a general proposition, is that the defendant would have an unfair advantage if the trial judge could not consider the intervening misdemeanor conviction as a factor at the second

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[4]In attempting to distinguish Markus and Williams, the Eleventh Circuit noted that those cases did not discuss several more recent cases from this Court e.g., Chaffin v. Stynchcombe, 412 U.S. 17, 93 S.Ct. 1977 (1973); Colten v. Kentucky, 407 U.S. 104, 92 S.Ct. 1953 (1972); Moon v. Maryland, 398 U.S. 319, 90 S.Ct. 1730 (1970). But those cases really do not address the issue presented here or in Markus and Williams.

sentencing. At the first sentencing hearing, WASMAN, through counsel, requested that the then pending mail fraud indictment not be considered for sentencing purposes. The district judge announced that it was not his practice to consider pending charges in arriving at a sentence. The Eleventh Circuit, adopting arguments made by the Government and the comments of the district judge, noted that if the false certificate case were again excluded from consideration at the second sentencing, the defendant would "have his cake and eat it,too." United States v. Wasman, 700 F.2d at 670. (App.p-A-31). However, that fear is unwarranted, both on these facts and as a general proposition. In the instant case, WASMAN did not avoid being sentenced

by a court with guilt in both the passport and certificate case considered. Those were precisely the circumstances when he was sentenced in the certificate case. At the time of that sentencing hearing, the first passport conviction was pending on appeal. The district judge specifically acknowledged that conviction, noted that both cases arose from basically the same facts and sentenced WASMAN to two years probation. Thus, a United States District Judge imposed a sentence fully aware of both convictions and fully able to consider both in arriving at an appropriate sentence. Perhaps the judge in the instant (passport) case did not like the sentence imposed in the certificates case, but to permit the enhancement as occurred herein results

in an improper pyramiding of sentences.

As a general proposition, the Eleventh Circuit noted that to adopt the Markus (Second Circuit) and Williams (Ninth) approach to Pearce would have "two possible consequences, neither likely to be of service to the governing constitutional considerations in Pearce. United States v. Wasman, 700 F.2d at 669 (App. p.p.-A-28-29). The first consequence would be, according to the Eleventh Circuit, for a sentencing judge to consider a charge merely pending at the time of the first sentence. Second, if the judge did not consider a pending charge then the defendant would receive, according to the Eleventh Circuit,"total immunization of the predating offense from consideration at any time." 700 F.2d at 669 (App.p.A-29).

However, the Circuit Court overlooks the fact that the predating[5] pending charge will be resolved at some time. If the defendant is subsequently convicted of that charge, he will come before a judge for sentencing. When he does, the judge will be able to consider both the case before him and the prior conviction in arriving at an appropriate sentence (as the judge in the false certificates case did here when he considered the first passport conviction). If the defendant is found not guilty of the predating offenses, then clearly that offense should not be considered by another judge in another case as an aggravating circumstance for sentencing. Thus, the defendant will not be immunized if a judge does not consider pending

[5]By "predating", it is meant the charge based on conduct occurring prior to the first sentencing hearing.

charges, even if he will be precluded from considering an ensuing conviction should his case be reversed on appeal and a second sentencing be required.

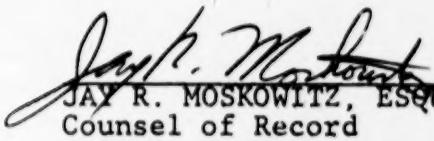
This Court has said that a trial judge is not constitutionally precluded, in re-sentencing, from considering events subsequent to the first trial that may throw new light upon a defendant. North Carolina v. Pearce, 395 U.S. at 723, 89 S.Ct. at 2079.

Though the intervening conviction may shed new light on the defendant, the chilling effect upon the defendant's decision-making as to whether to exercise his appellate rights demands that prior conduct not be considered on re-sentencing. To hold otherwise would result in an improper pyramiding of sentences as well as instill fear of vindictiveness in the defendant.

CONCLUSION

For the above stated reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of August 1983, three copies of the Petition for Writ of Certiorari were delivered by mail to the Solicitor General, Department of Justice, Washington, Department of Justice, Washington, D.C. 20530 and to Patty Merkamp Stemler, Esquire, Appellate Section, Criminal Division, United States Department of Justice, Washington, D.C. 20530.

JAY R. MOSKOWITZ, ESQUIRE

A P P E N D I X

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

Milton R. WASMAN,
Defendant-Appellant.

No. 81-5886.

United States Court of Appeals,
Eleventh Circuit.
March 17, 1983.

Following remand, 641 F.2d 326, defendant was convicted before the United States District Court for the Southern District of Florida. Norman C. Roettger, Jr., J., of making false statements in a passport application, and he appealed. The Court of Appeals, Markey, Chief Judge of the Federal Circuit, sitting by designation, held that: (1) defendant's efforts to show kidnapping and theft of his driver's license following making of the false statement was properly excluded as

irrelevant; (2) error, if any, in refusing to allow direct quotation of advice that defendant assume a non-Semitic name in his dealings with Arabs was harmless; and (3) where on first sentencing the judge disregarded then-pending charge but that charge resulted in conviction following first trial, there was no due process violation in considering that conviction in imposing enhanced sentence following retrial.

Affirmed.

Jay R. Moskowitz, Sands & Moskowitz, Miami, Fla, for defendant-appellant.

Patty Merkamp Stemler, Appellate Sect., Crim. Div., Dept. of Justice, Washington, D.C., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District

of Florida.

Before FAY and CLARK, Circuit Judges, and MARKEY*, Chief Judge.

MARKEY, Chief Judge:

Milton R. Wasman (Wasman) appeals his conviction by a jury in the United States District Court for the Southern District of Florida of knowingly and willfully making false statements in a passport application in violation of 18 U.S.C. §1542.[1]

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[1] 18 U.S.C. § 1542 provides:

False statement in application and use of passport

Whoever willfully and knowingly makes any false statement in an application for passport with intent to induce or secure the issuance of a passport under the authority of the United States, either for his own use or the use of another, contrary to the laws regulating the issuance of passports or the rules prescribed to such laws; or

Whoever willfully and knowingly uses or attempts to use, or furnishes to another for use any passport the issue of which was secured in any way be reason of any false statement- Shall be fined not more than $2,000 or imprisoned not more than five years, or both.

He asserts procedural errors, judicial bias, and a sentence enhancement violative of due process.

We affirm.

Background

At a first trial in September 1979, the government showed that in March 1978 Wasman applied for and obtained a passport in the name of his deceased law school classmate, David Hendrick. Wasman did not dispute that showing,but attempted to introduce evidence that his purpose was to employ a non-Semitic name in business dealings with Arab investors.[2]

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[2] The government also showed that other entries on the application were false (date and place of birth, marital status, etc.). Wasman does not dispute the falsity of those entries, but attempts to excuse them as designed to achieve the same mislead-the-Arabs purpose.

The district court excluded that evidence as irrelevant. The jury convicted and Wasman was sentenced to two years incarceration, six months to be spent in confinement, the balance suspended in favor of three years probation.

Wasman appealed, urging that he had legally assumed the name "Hendrick," and asserting error in the refusal to admit evidence of his purpose. Holding that evidence admissible as indicative of circumstances surrounding Wasman's assumed-name defense, the court reversed and remanded for a new trial. United States v. Wasman, 641 F.2d 326 (5th Cir. 1981).

At the second trial and to show that Wasman had not assumed a new name but had continued to use "Wasman", the government showed that in May 1978 he applied as "Wasman" for a duplicate driver's license, stating on the

application that the original had been stolen.

Wasman testified that in February 1978 he met in London with Ronnie Comninos and Andrew Connolly, who allegedly represented Arabs interested in Florida real estate, and who advised him to secure identification under a non-Semitic name. The court excluded testimony directly quoting that advice as hearsay, but permitted testimony on the general nature of the discussions.

Wasman also sought to show that Comninos and Connolly kidnapped him in Spain in March 1978; that they stole his driver's license and the "Hendrick" passport; and that he had traveled back to the United States under his "Wasman" passport. The district court excluded that evidence as irrelevant.

Wasman was again convicted of

violating 18 U.S.C. § 1542 and was sentenced to two years confinement. The court explained that it was enhancing the sentence in view of Wasman's interim conviction on a plea of nolo contendere to a charge of possession of conterfeit certificates of deposit.

Issues

(1) Whether it was error to exclude: (a) evidence of kidnapping; (b) testimony quoting advice of Comninos and Connolly. (2) Whether the trial court was biased against Wasman. (3) Whether the sentence enhancement violated Wasman's due process rights.

OPINION

(1) Exclusion of Evidence

(a) Kidnapping.

(1) Judge Roettger properly rejected as irrelevant Wasman's effort to show kidnapping and theft of his driver's license by Comninos and Connolly in Spain. Proof of those facts, if facts they be, would bear no relation to the charge of making false statements in an earlier passport application.[3]

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[3]Beyond the inherent irrelevance of the allegations, their proffer appears disingenuous in light of Wasman's having filed his false passport application before the date on which the license and the false passport were allegedly stolen.

Wasman says he "had a right to show the jury that he was telling the truth when he stated in his application for a duplicate license that the original had been stolen." The veracity of that statement, however, was never challenged. Thus Wasman's assertion that failure to admit evidence of a truthful application would leave the jury with an impression that he was prone to mislead when applying for various forms of identification is speculative and unfounded.

(b) Advice of Comninos and Connolly

(2) Relying on U.S. v. Herrera, 600 F.2d 502 (5th Cir. 1979), Wasman says testimony precisely quoting Comninos' and Connolly's advice was offered not to prove the truth of the matter asserted but to show his state of mind, and on that basis the testimony

should have been admitted. Appellant in Herrera, however, asserted a coercion defense to which the exact language of certain threats was critical. Connolly's and Comnino's exact statements are not critical here, where Wasman asserts neither threat nor coercion.

If there were error in refusing to allow direct quotation, it must be viewed as harmless. Wasman was permitted to paraphrase in detail his conversations with Comninos and Connolly, and to convey to the jury his alleged motivation in entering a false name on his passport application.

(2) Bias

Wasman says the trial judge made comments reflecting bias against him and entitling him to a new trial

before a different judge. The assertion is without merit.

(3) Wasman cites as indicative of bias the same evidentiary rulings he challenged on their merits. As indicated above, however, those rulings were correct and harmless. Without more, a judge cannot be charged with bias for having made evidentiary rulings. Nor, as set forth below, was the enhanced sentence indicative of bias, prejudice, or vindictiveness.

Judge Roettger's post-verdict comments to the jury concerning the background (i.e., the first trial and appeal) of the case and the evidentiary questions involved, did not in the slightest reflect personal bias or animosity toward Wasman. Significantly, Wasman cites no pre-

verdict statement to the jurors that would or might have influenced their impartiality.

There is on this record no basis whatsoever for inferring bias or prejudice of any kind against Wasman.

(3) Sentence Enhancement

The fact pattern out of which this issue rises is one of first impression in this circuit.

Wasman says enhancement of his sentence violated his right to due process, citing North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed 2d 656 (1969). In Pearce the Court said a judge may enhance the sentence of a reconvicted defendant who had successfully attacked a first conviction, but went on to state a

constitutional limitation on that authority: "Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." Id., at 725, 89 S.Ct., at 2080. Thereafter, "to assure the absence of such a motivation," the Court fashioned a procedural guideline:

> [W]henever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear.

Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.

Id., at 726, 89 S.Ct. at 2081.

In Pearce, the constitutional considerations of concern had their genesis not only in the possibility of judicial vindictiveness, but in the possibility of a prohibiting perception on the part of those convicted, i.e., that a successful appeal might itself be the cause for sentence enhancement on re-conviction. 395 U.S. at 724,725, 89 S.Ct. at 2080. Having identified vindictiveness and its inhibiting potential

as phenomena to be avoided, the Court elected to supply the quoted guidelines as a means to that end.[4]

[4] Judge Roettger followed precisely the procedural steps of Pearce, affirmatively stating on the record his reason for enhancing the sentence, basing that reason on objective information concerning identifiable conduct of the defendant, and making the factual data on which his action was based part of the record so that its constitutional legitimacy may be fully reviewed on appeal:

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[4]Prompting Justice Black to say, at 395 U.S. 740, 741, 89 S.Ct. 2083: Of course nothing in the Due Process Clause grants this Court any such power as it is using here. Punishment based on the impermissible motivation described by the Court is, as I have said, clearly unconstitutional, and courts must of course set aside the punishment if they find,

by the normal judicial process of fact-finding, that such a motivation exists. But, beyond this, the courts are not vested with any general power to prescribe particular devices: [i]n order to assure the absence of such a motivation." Numerous different mechanism could be thought of, any one of which would serve this function. Yet the Court does not explain why the particular detailed procedure spelled out in this case is constitutionally required, while other remedial devices are not. This is pure legislation if there ever was legislation. (Emphasis in original)

and at 395 U.S. 742, 89 S.Ct. 2084:

The danger of improper motivation is of course ever present. A judge might impose a specially severe penalty solely because of a defendant's race, religion, or political views. He might impose a specially severe penalty because a defendant exercised his right to counsel, or insisted on a trial by jury, or even because the defendant refused to admit his guilt and insisted on any particular kind of trial. In all these instances any additional punishment would of course be, for the reasons I have stated, flagrantly unconstitutional. But it has never previously been suggested by this Court that "[i]n order to assure the absence of such a motivation," this Court could, as a matter of constitutional law, direct all trial judges to spell out in detail their reasons for setting a particular sentence, making their reasons "affirmatively

appear," and basing these reasons on "objective information concerning identifiable conduct". Nor has this Court ever previously suggested in connection with sentencing that "the factual data...must be made part of the record." On the contrary, we spell out in some detail in Williams v. New York, 337 U.S. 241 [69 S.Ct. 1079, 93 L.Ed. 1337] (1949), our reasons for refusing to subject the sentencing process to any such limitations, and the Court has, until today, continued to reaffirm that decision. See, e.g., Specht v. Patterson, 386 U.S. 605 [87 S.Ct. 1209, 18 L.Ed. 2d 326] (1967). (Emphasis in original)

THE COURT: I would like to have you address particularly the fact that there's been an intervening conviction between the first trial and the second trial. And I do think that is a matter that the Court should take into consideration in determining sentence to be imposed at this time. And I would like to have you address that. And that, of course, is a matter that was before Judge Davis' -

MR. MOSKOWITZ: Be happy to.

THE COURT: - Presentence Report.

* * * * * * *

THE COURT: However, I make it always very clear that I do not consider pending charges in considering what sentence I impose. Therefore, when I imposed sentence the first time, the only conviction on Mr. Wasman's record in this Court's eyes, this Court's consideration, was failure to file income tax returns, nothing else. I do not consider then and I don't in other

cases either, pending matters because that would result in a pyramiding of sentences. At this time he comes before me with two convictions. Last time, he came before me with one conviction. Because Wasman's interim conviction was for an offense committed before his first trial, he focuses on the phrase "conduct ...occurring after the time of the original sentencing" in Pearce, saying it prohibits consideration of that offense as a basis for sentence enhancement.

Wasman's argument concerns but a part of the means, and ignores the end sought to be achieved in Pearce. It exalts words above substance. For those reasons, the argument is not persuasive. Moreover, a rigid limitation of increased sentences to those based on misconduct occurring after the first sentencing would needlessly erase relevant information from the sentencing slate, while

contributing nothing to the goal of avoiding vindictiveness. An intervening conviction adds a new dimension to the data before a sentencing judge who had disregarded charges merely pending at the time of an earlier sentencing hearing. When, as here, the effect of an intervening conviction is to convert what had been considered a legal nullity for sentencing purposes, i.e., a mere accusation, into a fact fully relevant to sentencing, i.e., that defendant had committed an additional crime, a sentence enhancement based on that additional conviction does not impede the goals outlined in Pearce.[5]

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[5]Though 18 U.S.C. §3577 provides that "No limitation shall be placed on the information...a court...may...consider..." in sentencing, a strong rationale supports Judge Roettger's stated practice of ignoring pending charges. Beyond his concern for "pyramiding" sentences, a mere accusation does not establish that the charged conduct was that of the defendant. If our "innocent till proven

guilty" jurisprudence means anything, it must mean that punishment may not be meted out for conduct not established as that of the defendant.
We need not, and therefore do not, here decide whether unproven charges must be invisible on a defendant's legal slate at sentencing. Whether consideration of a mere accusation in setting a sentence would accord with due process must await determination in a case squarely presenting the issue.

[5] The thrust of Pearce is that increased punishment after appeal and reconviction violates a defendant's due process rights when it results from judicial vindictiveness. In setting forth its guidelines the Court's express objective was to assure absence of such retaliatory motivation. Reading the Court's Pearce opinion in its entirety and in light of the facts of that case, as we must, Armour & Co. v. Wantock, 323 U.S. 126, 132, 133, 65 S.Ct. 165, 168, 169, 89 L.Ed. 118 (1944), convinces us that increased sentences are not thereby limited to instances in which a defendant has committed an offense after the first trial.[6]

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[6] In Pearce, the involved States offered no reason for increasing the sentences of Rice or Pearce. 395 U.S. at 726, 89 S.Ct. at 2081. The court had no occasion therefore to consider the propriety of basing an increased sentence on an intervening conviction for an offense committed before a first sentencing.

Further, the majority opinion in Pearce contains language in direct conflict with Wasman's position. In dealing with an Equal Protection argument, the Court said, "A man who is retried after his first conviction has been set aside may be acquitted. If convicted, he may receive a shorter sentence, he may receive the same sentence, or he may receive a longer sentence than the one originally imposed. The result may depend upon a particular combination of infinite variables peculiar to each individual trial." 395 U.S. at 722, 89 S.Ct. at 2079. At another point, the court quoted with approval from Williams v. New York, 337 U.S. 241, 245, 69 S.Ct. 1079, 1082, 93 L.Ed. 1337 (1949), saying "A trial judge is not constitutionally precluded, in other words, from imposing a new sentence, whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's "life, health, habits, conduct, and mental and moral propensities". 395 U.S. at 723, 89 S.Ct. at 2079. (Emphasis added). A conviction is, of course, an "event". Though immediately thereafter and in its guidelines the Court referred respectively to defendant's conduct "subsequent to the first conviction" and "occurring after the first sentencing," it would appear that those phrases rested on an assumption that all conduct occurring before the first conviction and sentencing had been considered or somehow merged in setting the first sentence. The assumption is inapplicable where, as here, the earlier conduct was ignored until it became legally attributable to the defendant.

The target in Pearce was vindictive sentencing, not defendant misbehavior between trials. No reason exists for applying a phrase in the Pearce guidelines to circumstances bearing no relation to the purpose of those guidelines. There is on this record no evidence whatsoever that the enhancement here resulted from vindictiveness of Judge Roettger. Nor does Wasman argue that it did. In such circumstances, an increased sentence neither thwarts the purpose of Pearce and its guidelines nor offends constitutional due process considerations.

The view here expressed is consonant with the Supreme Court's treatment of Pearce as unequivocally directed to and only to the hazard of vindictiveness. In Moon v. Maryland, 398 U.S. 319, 90 S.Ct. 1730, 26 L.Ed.2d 262 (1970), the Court dismissed a writ of certiorari as

improvidently granted because Moon did not allege that his increased sentence was motivated by vindictiveness. Id. at 320, 90 S.Ct. at 1730-31. In Colten v. Kentucky, 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed.2d 584 (1972), the Court explained that Pearce did not bar an increased sentence after a de novo trial because the "possibility of vindictiveness, found to exist in Pearce, is not inherent in the Kentucky two-tier system." Id.at 116, 92 S.Ct. at 1960. In Chaffin v. Stynchcombe, 412 U.S. 17, 93 S.Ct. 1977, 36 L.Ed.2d 714 (1972), in the course of considering whether imposition of an increased sentence by a jury upon a retrial violates due process, the Court said:

[Pearce] was premised on the apparent need to guard against vindictiveness in the resentencing process. Pearce was not written with a view to protecting

against the mere possibility that,once the slate is wiped clean and the prosecution begins anew, a fresh sentence may be higher for some valid reason associated with the need for flexibility and discretion in the sentencing process. The possibility of a higher sentence was recognized and accepted as a legitimate concomitant of the retrial process. [Emphasis in original]

Id., at 25, 93 S.Ct., at 1982

[6] In sum, "[t]he lesson that emerges from Pearce, [Moon], Colten and Chaffin is that the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of 'vindictiveness'". Blacklege v. Perry, 417 U.S. 21, 27, 94 S.Ct. 2098, 2102, 40 L.Ed.2d 628 (1974).

Thus the post-Pearce guidance supplied by the Court makes clear that where, as here, the record establishes a total

absence of any "realistic likelihood" of vindictiveness, an increased sentence does not offend the Due Process Clause.

Wasman cites United States v. Markus, 603 F.2d 409 (2d Cir.1979) and United States v. Williams, 651 F.2d 644 (9th Cir.1981). In Markus, the court said, "[i]ntervening convictions... based on indictments pending at the time of the original sentencing...and upon conduct predating that sentencing, cannot satisfy Pearce's exacting requirement". 603 F.2d at 414. The Ninth Circuit's view expressed in Williams is substantially identical to that expressed in Markus.[7]

[7] In Williams, the indictment on which the intervening conviction was based occurred after the original sentencing.

[7] The later Supreme Court opinions explaining Pearce were not discussed in either Markus or Williams. We decline to adopt the approach taken by our sister circuits in Markus and Williams because, in our view, that approach separates a suggested procedure for avoiding a result from the result sought to be avoided. It grants an independent status to the words "conduct...occurring after...", while disregarding their relationship, if any, to the avoidance of vindictiveness. Adoption of that approach, moreover, would have only two possible consequences, neither likely to be of service to the governing constitutional considerations in Pearce. One consequence would be a requirement that an offense merely charged at the time of first sentencing be considered in setting that first sentence. The alternative would be

total immunization of the predating offense from consideration at any time. We think the better course lies in recognizing that when offenses the subject of charges then merely pending are totally disregarded at original sentencing, those offenses may be considered on the record at second sentencing when convictions on those offenses have occurred in the interim. Nothing in that course would appear to us to impede, even peripherally, the thrust of Pearce, i.e., avoidance of sentence enhancement based on vindictiveness, real or apparent, for success on appeal.[8]

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[8] Wasman points to Justice White's one-sentence concurrence in Pearce, 395 U.S. at 751, 89 S.Ct. at 2089, in which he suggested that an increased sentence should be baseable on "any objective, identifiable, factual data not known to the trial judge" at original sentencing, and to the Ninth Circuit's thought, expressed in Williams, that Justice White would have had no cause to write separately if Pearce would permit an increase based on an intervening conviction. None of the five opinions filed in Pearce discussed the present

fact pattern, nor is there indication that its ramifications were specifically considered by any of the five writers. We are content to rest our decision therefore on the practicalities of the actual events reflected in the present record, declining surmise respecting what might have been the thought processes of individual Justices if the record in Pearce had corresponded to that now before us.

The desire to have and simultaneously eat one's cake is understandable; but catering in the courtroom to that desire can produce only annoying anomalies in the law. This case is illustrative. Wasman specifically requested at his first sentencing hearing that the offense for which a charge was then pending be disregarded because he had not had an opportunity to disprove the charge. Judge Roettger, in accord with his announced practice, granted that request. Now, after conviction for that same offense, Wasman again says it should continue to be disregarded, this time because the critical date should be that of the offense. As indicated above, the argument is unavailing.

In all of the circumstances, we hold that Wasman's increased sentence was in this case proper, that it was based on objective, factual new evidence

not previously considered, that it was neither motivated by judicial vindictiveness nor reasonably perceivable as having been so motivated, and that it did not therefore infringe Wasman's right to due process.

Conclusion

No error occurred in refusing the evidence of kidnapping and quotation of Comninos and Connally. Nothing of record remotely indicates bias or prejudice against Wasman. The enhancement of Wasman's sentence in view of his intervening conviction was not violative of Wasman's due process rights. Accordingly, we affirm.

The conviction is AFFIRMED.

IN THE DISTRICT COURT OF
THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 78-253-Cr-NCR

UNITED STATES OF AMERICA

vs.

MILTON R. WASMAN

_____/

United States District Court
299 East Broward Boulevard
Fort Lauderdale, Florida
August 31, 1981

The above-entitled matter came on for sentencing before the Honorable NORMAN C. ROETTGER, JR., United States District Judge, pursuant to Notice, commencing at 1:30 p.m.

APPEARANCES:

JEFFREY H. KAY, ESQUIRE
Assistant United States Attorney
On behalf of the Government

JAY MOSKOWITZ, ESQUIRE
On behalf of the Defendant

THE COURT: Madam Clerk, please call the case for sentencing.

MS. JACOBS: United States of America versus Milton Wasman.

MR. MOSKOWITZ: Afternoon, Your Honor. Jay Moskowitz, on behalf of Mr. Wasman. Mr. Wasman is here.

THE COURT: Mr. Moskowitz, I have reviewed the new Presentence Report in connection with the matter before Judge Davis which was prepared January of this year and also the addendum to it, dated August 27, 1981, entitled, An Update to Presentence Investigation on Mr. Wasman, and, of course, I have heard the evidence in the case twice.

Have you had a chance to go over the new Presentence Report in this matter?

MR. MOSKOWITZ: Yes, I have.

THE COURT: Has your client had a chance to go over it?

MR. MOSKOWITZ: Yes, he has.

For the record, if Your Honor recalls, Mr. James Russ was the trial counsel in this particular case before Your Honor. Mr. Wasman would like to go forward today. I am here instead of Mr. Russ. And I just want to make that clear for the record before we even start that it's Mr. Wasman's desire that I be here today and that we go forward today.

THE COURT: Is that your wish and intention that Mr. Moskowitz represent you at this time?

DEFENDANT WASMAN: Yes, sir. We have discussed it with Mr. Russ so that he is aware of it and he is relieved of any responsibility of being here today.

THE COURT: Very well.

Please proceed then with allocution. But, first, are there any additions or corrections to be made to the Presentence Report?

MR. MOSKOWITZ: There are just two, Your Honor.

I represented Mr. Wasman in the case before Judge Davis and was intimately involved in preparing our input into the PSI in that particular case and reviewed it both in January when that case was called for sentencing and last week, again, in the probation office in Miami.

There is just one thing, an oversight that was neglected to be corrected in that PSI, and that had to do with Mr. Wasman's net worth. Since the time of the PSI preparation, back in January, his net worth has decreased because of various legal problems and other matters by approximately $43,000, which would be accurate to reflect now in the update as a change. I told Mr. Schwartz that at the time it had been typed, the update. I told him that I would present that to

you today.

There are a few things I'd like to say.

THE COURT: Very well.

MR. MOSKOWITZ: First off, I am not going to say much about the facts of the case. All of that has been said before. As Your Honor said, you sat through the trial of this case twice and are very familiar with the facts of the case. We also included in our presentation which was incorporated in the PSI update the Defendant's version of the facts. Very briefly, Mr. Wasman just admits that he went to the Passport Office that day back in 1978 and obtained a passport in the name of David Hendrick, but as Your Honor is aware, both in the testimony at the last trial and also in our input into the PSI, the reasons for that which I don't think I have to waste the Court's time now going over again, it's in the update.

What I would like to talk about for a few minutes is Milton Wasman, himself.

THE COURT: Very well.

MR. MOSKOWITZ: Particularly those things in his life that have changed since the last time he was sentenced before Your Honor.

THE COURT: I would like to have you address particularly the fact that there's been an intervening conviction between the first trial and the second trial. And I do think that is a matter that the Court should take into consideration in determining sentence to be imposed at this time. And I would like to have you address that. And that, of course, is a matter that was before Judge Davis'--

MR. MOSKOWITZ: Be happy to.

THE COURT: --Presentence Report.

MR. MOSKOWITZ: I'd be more than happy to, Your Honor.

THE COURT: Very well.

MR. MOSKOWITZ: First off, in that case, Mr. Wasman was indicted sometime, I think it was previous to the Indictment in this particular case, four counts of mail fraud. Based on negotiations with the U.S. Attorney's Office and the U.S. Attorney dismissed that particular case and filed a one-count misdemeanor Information of possession of false bank certificates of deposit to which Mr. Wasman entered a plea of nolo contendere, basically telling Judge Davis at the time of the plea which was last October that the case had been around for a long period of time, and due to his health problems--You may be aware Mr. Wasman had a stroke a couple years ago, has had numerous other health problems. Also, he wanted to get this case behind him. Although he did not admit his guilt in that case under Alford versus North Carolina, he did enter a plea saying it

was in his best interests to dispose of the case. Judge Davis accepted the nolo plea, also under the Alford guidelines, and ordered a PSI.

In January of this year, Mr. Wasman was sentenced. We submitted a lengthy input to the PSI before Judge Davis. I'm not sure if it was all included in the package that Your Honor received but--

THE COURT: I received a letter with the PSI Judge Davis had, apparently.

MR. MOSKOWITZ: They were all attached to the PSI. I believe there were some 100 pages at that time. It basically outlined what Mr. Wasman's defense would be had he gone to trial in the then mail fraud case. After an hour-and-a-half sentencing hearing before Judge Davis, His Honor imposed a sentence of two years' probation on Mr. Wasman in that particular

case, misdemeanor, possession of false certificates of deposit case. That basically is the case before Judge Davis.

I noted in the update version of the PSI in this particular case that the Government attorney, David Hammer, said that the plea in that particular case should be considered by Your Honor and should give grounds for perhaps increasing the sentence over what Your Honor gave Mr. Wasman last time around, and I would most heartily object to that. I think that that would be improper under the law.

The indictment in that particular case, the mail fraud case, was brought before the Indictment in this case, and even though something took place after the first sentence in this case, that is, the sentence by Judge Davis, that does not come under the guidelines set forth by the Supreme Court in North

Carolina versus Pearce--

THE COURT: However, I make it always very clear that I do not consider pending charges in considering what sentence I impose. Therefore, when I imposed sentence the first time, the only conviction on Mr. Wasman's record in this Court's eyes, this Court's consideration, was failure to file income tax returns, nothing else. I did not consider then and I don't in other cases either, pending matters because that would result in a pyramiding of sentences. At this time he comes before me with two convictions. Last time, he came before me with one conviction.

MR. MOSKOWITZ: Well, Your Honor, if I could read from a portion of North Carolina versus Pearce which is at 89 Sup. Ct. 2072. The portion I am going to be reading is from 2081: "In order to

assure the absence of such a motivation," that is motivation to penalize a man for going through trial or from taking an appellate right--"we have concluded that whenever a Judge imposes a more severe sentence upon a Defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the Defendant occurring after the time of the original sentencing proceedings."

The operative word here is "conduct," and the conduct being not--what I'm arguing, the conduct not being the plea but the actual conduct that took place. The conduct--

THE COURT: Well, let me tell you, Mr. Moskowitz. I understand what you're saying but I'm telling you how I considered it the first time. I'm telling

you how it appears this time. Then there was one conviction. Now, there are two convictions. Now, because it so happened that the events he was charged with occurred before should not be considered in a situation like this, then you're suggesting to the Court that, Well, don't worry about pyramiding sentences, Judge, consider those pending matters and future things because we might take an appeal and then in a subsequent trial if he were found guilty and there was a resentencing in this case, then I'm going to assert that Pearce would preclude your considering it even though the conviction in the other matter had occurred afterwards. That is a beautiful example of blowing hot and blowing cold, riding the horse both ways and eating your cake--or a million other metaphors we could come up with.

MR. MOSKOWITZ: Two comments I would like to make.

THE COURT: I would like to hear your response to that. I have always been very candid about setting forth my sentencing objectives and sentencing considerations. I try not to make a secret about it at all.

MR. MOSKOWITZ: Two things I'd like to say. First thing is really I'm not suggesting a more harsh sentence, you know, penalize Mr. Wasman for going to trial. Had an appeal not been taken in this case which the Fifth Circuit deemed meritorious enough to sent it back for a new trial this case would have been long gone before the nolo contendere plea before Judge Davis in the other case.

THE COURT: Not so. I sentenced him to two years confinement, suspended six months, that he would have done six months confinement under the split sentence provision and upon release, upon dis-

charge from incarceration, the Defendant shall be placed on probation for a period of three years. Sentence was imposed October, 1979. If he had been remanded on the day of sentencing he would have done six months confinement and then three years probation.

MR. MOSKOWITZ: Maybe I didn't make myself clear. Been long gone before the sentencing procedure before Your Honor. I said you would have sentenced him, I believe it was, some five or six--it was over a year before the Judge Davis matter took effect or y ear-and-a-half, I think it was. You sentenced him, I think it was, in late '79, first time around on this case. The Judge Davis plea was in October of '80. So that the matter was long gone from Your Honor for sentencing purposes.

THE COURT: How about revocation of probation purposes?

MR. MOSKOWITZ: Revocation of probation? We are talking about conduct that took place in the probation period. The conduct in the Judge Davis case took place back in 1975 through '76, '77.

THE COURT: Here, again, you are trying to preclude me from considering pending matters on the one hand and then preclude me from considering subsequent conviction on the other.

MR. MOSKOWITZ: The Second Circuit was faced with almost the same fact situation in the case of United States versus Markus, 603 F.2d, 409. The Second Circuit ended up saying-- In that case, there were two Indictments. One Indictment, the fact situation is kind of just about the same but there was a second Indictment. Then there was a plea to both cases at the same time. Then one case was taken up on appeal and a problem with the plea session. The Second Circuit reversed.

It came down for a secondary plea and resentencing and the Judge wanted to give the Defendant--did give the Defendant more time than he gave him the first time around, and the Second Circuit in the Markus case said that the Judge could not do that under the Pearce guidelines.

At 414 of the opinion the Court said "Such an increase in the punishment is not per se invalid. But it must be based on 'objective information concerning identifiable conduct on the part of the Defendant occurring after the time of the original sentencing proceeding.'" That's a quote from North Carolina versus Pearce. "No such conduct exists in this case. Intervening convictions of appellants, based upon Indictments pending at the time of the original sentencing by Judge Werker and upon conduct predating that sentencing cannot satisfy Pearce's exacting requirement."

So I believe that based upon Pearce, based upon Markus and based upon the ideology behind Pearce that any enhancement in sentencing would not be appropriate in this case.

THE COURT: Please proceed.

MR. MOSKOWITZ: As I started to say before, a lot of things have changed in Mr. Wasman's life since the last time he stood before Your Honor. At about the time of the first conviction in this case, he was suspended from practice by the Florida Bar. With the exception of a few cases that he had pending at the time of that conviction, needless to say, based on that, his whole lifestyle changed. His wife of about forty years had to go out and get a job for the first time to really support them. He took a position, non-legal position, worked part-time and then full-time for some period of time. And then as I mentioned to Your Honor when I first

started, it changed circumstances considerably, having to go into his assets to support his wife and himself for the last couple of years. I realize that he has been before this Court before but his life has not been easy through the last couple of years. He has suffered considerably. And I believe that this type of a case with exactly what he was charged with and based upon Mr. Wasman himself, that a lesser sentencing than Your Honor handed down the last time would be appropriate.

The only other thing that I would like to add is that in the input to the update to the PSI that was presented to Your Honor a couple of days ago by Mr. Schwartz, probation officer, there was another comment by Mr. Hammer that Mr. Wasman is believed involved, I think it said, in numerous frauds around the State. I'd ask that particular comment

be striken, not considered just for the record. I know Your Honor won't but if they want Your Honor to consider other frauds let them prove the other frauds. You just can't make that statement in a PSI, and I ask that that be striken.

THE COURT: I certainly won't consider it.

MR. MOSKOWITZ: That's basically what I had to say at this time.

THE COURT: Very well.

Anything from the Government?

Mr. Kay?

MR. KAY: Your Honor, I am standing in for Mr. Hammer who had to return to Miami for a court appearance down there. Not being that familiar with the case, and being aware of the Markus case in the Second Circuit, I still believe that the Court probably, Your Honor, could be able to resentence any way the Court deems fit to. If it wants to enhance the penalty

of the prior case, the Court can be allowed to do it. I don't think Markus or Pearce talks about that provision. I think the Court can resentence within the Court's discretion as to any penalty it wishes to give at this point in time.

THE COURT: Mr. Wasman, you may say anything you like in your own behalf, anything at all in mitigation of punishment, sir.

DEFENDANT WASMAN: I don't think there is anything I could add, Your Honor.

THE COURT: Very well.

As everybody who appears in this courtroom knows where probation is involved or a split sentence with a probationary period, I think I made it very clear that, one, I don't consider pending prosecutions and, two, the Court does not take violations of probation lightly. Almost always, the sentencing which results in probation or a probationary

period under a split sentence contains the admonition from me that they discuss the matter with their probation officer and with their lawyer and they will find that I consider violation of probation a serious matter which will almost inevitably, almost inevitably, that is, result in their serving the original term of imprisonment imposed. It's also why I very seldom withhold adjudication of confinement but always give a sentence and then suspend it and impose probation if I'm going to impose a probationary period. I want a Defendant to know what they're facing. I think that's just honest. It may be a sufficient motivation for them to avoid any problem.

Now the argument made by Mr. Moskowitz about the interpretation of Pearce and his reliance on the Second Circuit's opinion I think results if it

were adopted by any other circuit in a situation as this would result in the unfortunate situation of a sentencing Judge considering pending matters while a Defendant before him for a sentencing still enjoyed the presumption of innocence in those pending matters. It would give the Defendant an absurd advantage of being able to appeal a conviction, Case A, and because Case B stemmed from charges which predated the sentencing in Case A but the matter had not been resolved to the point of conviction or acquittal, would then enable him after being sentenced in Case A to negotiate the best situation possible in Case B, then if the appeal in Case A resulted in a remand and a new trial and a conviction again, then asserting, Judge, you aren't allowed, of course, to consider

or we are glad you didn't consider anything in pending Case B at the time you sentenced us originally in Case A but you now can't consider the matter either at the resentence for the second conviction under Case A. As I indicated earlier, that is an absurd advantage that a criminal Defendant would have in those situations. The only way a trial judge could protect the interests of society in such situations would be to depart from the better practice, I think, of not considering pending prosecutions and cranking them into the Judge's determinations even if it resulted in a pyramiding of sentences, however unintended, for that particular Defendant. If that is the interpretation of the Second Circuit, then I question its logic and its merit and I would hope the Fifth Circuit would not also adopt such an absurd anomaly in the law by merely

rubber-stamping the Second Circuit's approach.

Also, as I indicated, I would and do issue a revocation of probation warrant any time there is a subsequent conviction after I have imposed a probationary sentence. At that hearing, I then give Defendants an opportunity after they have been found to have violated probation, an opportunity to show why the original sentence should not be reinstated. And had this conviction come up and Mr. Wasman not taken an appeal, I assure you I would have signed a warrant for revocation of probation and we would have had a hearing and I assume you would have been making the same argument, Mr. Moskowitz. I can assure you, I would have revoked the probation and sentenced him to complete the remainder of his two-year sentence originally imposed, given those assumpt-

ions.

Mr. Wasman is a lawyer Yet, he stands before the Court having failed to report $61,000 in income taxes one year or income--

MR. MOSKOWITZ: To what are you referring, Your Honor?

THE COURT:--and for that he was adjudicated guilty of failure to file for the year, 1968, and he received 18 months' probation by Judge Scott in Jacksonville. Then, in this case--

MR. MOSKOWITZ: That was a failure to file case, Your Honor.

THE COURT: Pardon?

MR. MOSKOWITZ: That was what I said, failure to file. If I didn't, I'm sorry, but it was clearly a failure to file.

THE COURT: And then, since then there have been two other matters in connection with Mr. Wasman. One where

he uses the name of a dead classmate, this case, to get a false passport, and the other one, the case where he pled guilty before Judge Davis, where they induced European investors apparently to part with better than a half-million dollars on land investments in Florida and they were secured by certificates of deposit in a non-existent bank. It sounds like echos of the Bank of Sark, with which we are all familiar, in Broward County.

MR. MOSKOWITZ: As I said, he pled to false certificates of deposit.

THE COURT: Certificates on an entity called Central National Trust, Inc. of Panama, only it didn't exist.

At the time of the first sentencing, I just thought that Mr. Wasman was one of those people who couldn't see the out-of-bounds lines very clearly and didn't care too much which side of it he was on. This Presentence Report gives

me information about this other matter that's hardly an innocous--if that's not a travesty of word--than situations such as failure to file your tax returns or making various false statements in application for passport. Considerably different situation.

MR. MOSKOWITZ: Which PSI are you referring to, Your Honor?

THE COURT: It's dated June 13, 1981.

MR. MOSKOWITZ: The one to Judge Davis?

THE COURT: Yes, sir.

Therefore, I shall impose the original sentence of confinement. It is adjudged the Defendant be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two years or until otherwise discharged by due process of law. I think I have satisfied

the requirements of Pearce, spelled out my reasons. I think I have also satisfied the Fifth Circuit's requirements and advised at the beginning of this matter that I wished you to comment on the matter that was before, where he was eventually sentenced by Judge Davis, and you have been given an adequate opportunity to rebut or augment that data.

MR. MOSKOWITZ: Just one question for the record. Do you have before you the various attachments in the Judge Davis matter to the PSI?

THE COURT: No, sir, I did not.

MR. MOSKOWITZ: They were incorporated by reference in the original PSI, which basically explained just about the entire case. We had about an hour-and-a-half hearing before Judge Davis that day in which he asked numerous

questions and we explained numerous answers at that time.

THE COURT: I have given you your opportunity to present your case. You wish more time?

MR. MOSKOWITZ: To comment to Your Honor about the various matters in the Judge Davis case is what I am really asking. I'm not sure what Your Honor means.

THE COURT: I have a guilty plea or nolo plea--that's guilty for sentencing purposes-- before Judge Davis--

MR. MOSKOWITZ: That's correct.

THE COURT: --for possession of counterfeit foreign obligations; that is, the certificates of deposit on a non-existent Panamian bank. Is that not correct?

MR. MOSKOWITZ: That's correct. And we submitted a lengthy input to the PSI which was incorporated into the PSI

by the probation officer at that time which basically explained the whole situation and matter and we had a long discussion before Judge Davis in that particular case describing basically the three areas of the case wherein the Government claimed criminality basically on Mr. Wasman's part: One was that the land in question was mortgaged--

THE COURT: Mr. Moskowitz, your client pled nolo.

MR. MOSKOWITZ: That's correct, he pled nolo and said that I'm not pleading because I'm guilty, I'm pleading because I want to get this matter behind me, and then we started this lengthy--

THE COURT: I don't think much of Alford pleas except in the situation where, as I recall, Alford pled guilty to first degree murder to avoid the risk of the chair.

MR. MOSKOWITZ: That was the nature though of our plea before Judge--

THE COURT: I try to avoid ever taking an Alford plea because I want a Defendant if, they think they're not guilty to have a chance for a jury to say so.

MR. MOSKOWITZ: All right. Well--

THE COURT: This is not Mr. Wasman's first time at bat as a Defendant in Federal Court. It was his first time at bat where you are claiming it was an Alford situation after a prior conviction and prior plea.

MR. MOSKOWITZ: Which was tendered to Judge Davis and which he accepted on those terms at that particular time. And like I said--

THE COURT: I understand that. But I'm not bound by Judge Davis' reasoning.

MR. MOSKOWITZ: I just want to indicate--

THE COURT: What I'm saying, on what is here before me, nolo plea to possession of counterfeit foreign obligations, namely -- as you admitted-- certificates of deposit on a Panamanian bank that doesn't exist which were used to lure investors into making investments--

MR. MOSKOWITZ: As I said--

THE COURT:--that would be sufficient in my book to revoke probation anytime. If there ever was a good cause for a probationer to be off the street that's it.

MR. MOSKOWITZ: Like I said, the facts in that case predated this particular case and imposition of sentence-

THE COURT: I have explained my position on that at great length. Hopefully, my long explanation on Case A and Case B will make some sense when I get

the chance to read the transcript.

MR. MOSKOWITZ: Very well.

THE COURT: If not, I shall modify it so that it does for the benefit of any appellate review, for that purpose.

Of course, Mr. Wasman, you have a right of appeal. Your appeal should be filed within ten days. The Clerk may be instructed to file a notice of appeal in your behalf.

You are instructed to advise your client, Mr. Moskowitz, and perfect an appeal if he desires to take one and--

MR. MOSKOWITZ: We will be filing a notice of appeal today.

THE COURT: --procedures available whereby you can take an appeal even if you don't have the funds to pay for it.

The Defendant is to report to the institution designated by the Bureau

of Prisons at his own expense on September 3, 1981 by 10:00 o'clock in the morning. If you don't care to do so at your own expense, you must report by that hour and on that date to the United States Marshal's Office in the Federal Courthouse, 300 Northeast First Avenue, Miami, Florida.

MR. MOSKOWITZ: We will be filing a notice of appeal today. We would be requesting an appeal bond.

THE COURT: Go ahead and file your motions. I will rule on them.

Bond continued on the same terms and conditions until the time of reporting.

(Thereupon, the foregoing proceedings were concluded.)

CERTIFICATE

STATE OF FLORIDA)
)
COUNTY OF BROWARD)

I, RUDY E. FOX, Official Court Reporter, do hereby certify that the foregoing transcript, consisting of pages numbered from 1 to 26, inclusive, contains a true and correct transcript of my shorthand notes as taken by me from a recording of the proceedings that took place at the time and place aforesaid.

DATED at Fort Lauderdale, Florida, this ___day of _____,1981.

Official Court Reporter

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-5886

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MILTON R. WASMAN,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion March 17, 11 Cir., 1983 _____F.2d_____). (June 2, 1983)

Before FAY and CLARK, Circuit Judges, and MARKEY*, Chief Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35,

Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Peter Fay

*Honorable Howard T. Markey, Chief Judge for the Federal Circuit, sitting by designation.

SUPREME COURT OF THE UNITED STATES

NO. A-1013

MILTON R. WASMAN,

Petitioner,

v

UNITED STATES

O R D E R

UPON CONSIDERATION of the application of counsel for the petitioner and the response filed thereto,

In view of the apparent conflict between the decision of the Courts of Appeals for the Eleventh Circuit and decisions of the Courts of Appeals for the Second and Ninth Circuit on an issue of some importance, it is ordered that the mandate of the United States Court of Appeals for the Eleventh Circuit, case No. 81-5886, be, and the same is hereby, stayed pending the timely filing and

disposition by this Court of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, this stay is to continue in effect pending the sending down of the judgment of this Court.

/s/ Lewis F. Powell

Associate Justice of the Supreme Court of the United States

Dated this 27th day of June, 1983

No. 83-173

In The
Supreme Court of the United States
October Term, 1983

MILTON R. WASMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

JOINT APPENDIX

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Petition for Writ of Certiorari filed August 1, 1983
Certiorari Granted October 31, 1983

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Date	Proceedings
August 9, 1978—	Indictment returned by Federal Grand Jury charging the Defendant with obtaining a passport using a false name.
September 10, 1979—	Jury returns verdict of guilty.
October 18, 1979—	First Sentencing hearing at which Defendant was sentenced to two years but pursuant to split sentencing provision whereby he is to serve six months incarceration and then be placed on probation for three years.
October 19, 1979—	Notice of Appeal filed.
April 2, 1981—	United States Court of Appeals for the Fifth Circuit reverses conviction and remands for a new trial (reported at 641 F. 2d 326).
July 17, 1981—	Jury verdict of guilty at second trial.
August 31, 1981—	Second sentencing hearing at which Defendant was sentenced to a straight two years incarceration.

UNITED STATES DISTRICT COURT
for the Southern District of Florida

United States of America vs.
Defendant Milton Wasman

Docket No. 78-253-CR-NCR

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date—Oct. 18, 1979.

• • •

X WITH COUNSEL James Russ, 441 1st Fed. Bldg., 109 East Church St., Orlando, Fla. 32801.

PLEA: • • • ☒ NOT GUILTY.

There being a finding/verdict of • • • ☒ GUILTY.

FINDING & JUDGMENT: Defendant has been convicted as charged of the offense(s) of False Statement on an Application for a U. S. passport, in violation of Title 18, USC Section 1542.

SENTENCE OR PROBATION ORDER: The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YEARS or until otherwise discharged by due process of law, it being further

ORDERED AND ADJUDGED, pursuant to the split-sentence provision of Title 18 USC, Chapter 231, Section

3651, that the defendant be confined to a jail-type institution for a period of SIX (6) MONTHS, thereafter execution of the remainder of sentence of confinement be suspended and, commencing immediately upon discharge from incarceration, the defendant shall be placed on probation for a period of THREE (3) YEARS under the Standing Conditions of Probation as defined by the Court's Order entered August 1, 1964. It is further

SPECIAL CONDITIONS OF PROBATION: ORDERED AND ADJUDGED that execution of sentence of confinement shall be deferred until November 23, 1979 at 10 A. M., at which time the defendant shall surrender himself to the institution designated by the Bureau of Prisons, at his own expense, or in the alternative, to the United States Marshal in Miami, Florida.

ADDITIONAL CONDITIONS OF PROBATION: In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION: The court orders commitment to the custody of the Attorney General and recommends, Eglin Air Force Base, Florida.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U. S. Marshal or other qualified officer.

Signed by ☒ U.S. District Judge /s/ Norman C. Roettger, Jr., 19 Oct. 1979.

UNITED STATES DISTRICT COURT
for the Southern District of Florida

United States of America vs.
Defendant MILTON WASMAN

Docket No. 78-253-CR-NCR

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date—August 31, 1981. * * * ☒ WITH COUNSEL Jay Moskowitz, Peninsula Fed. Bldg., Rm. 501, 200 SE 1st St., Miami, FL.

PLEA: * * * ☒ NOT GUILTY.

There being a finding/verdict of * * * ☒ GUILTY.

FINDING & JUDGMENT: Defendant has been convicted as charged of the offense(s) of False Statement on an Application for a U. S. passport, in violation of Title 18, USC Section 1542.

SENTENCE OR PROBATION ORDER: The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YEARS, or until otherwise discharged by due process of law. It is further

ORDERED that the execution of the sentence of confinement be deferred until September 30, 1981 at 10 A. M.

at which time the defendant shall report to the institution designated by the Bureau of Prisons at his own expense, or in the alternative, to the U. S. Marshal in Miami, Florida.

• • •

COMMITMENT RECOMMENDATION: The court orders commitment to the custody of the Attorney General and recommends,—

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U. S. Marshal or other qualified officer.

SIGNED BY ☒ U. S. District Judge /s/Norman C. Roettger, Jr., Aug. 31, 1981.

[3SR1]*

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No 78-253-Cr-NCR

UNITED STATES OF AMERICA,

vs.

MILTON WASMAN

United States District Court
299 East Broward Boulevard
Fort Lauderdale, Florida
October 18, 1979

The above-entitled matter came on for sentencing before the Honorable NORMAN C. ROETTGER, JR., United States District Judge, pursuant to Notice, commencing at 9:30 o'clock a. m.

APPEARANCES:

KEVIN MOORE, ESQUIRE
Assistant United States Attorney
On behalf of the Government

JAMES RUSS, ESQUIRE
On behalf of the Defendant

---

*Bracketed number refers to page location in 3rd Supplemental Record on appeal 3SR—.

[3SR2] INDEX

[3SR3] The Court: Good morning, lady and gentlemen.

I received some last minute matters. Two or three things have come up in what was scheduled this morning that required some time to review before we could begin. However, we are ready to begin now in the case of United States versus Wasman.

The Deputy Clerk: State your appearances for the record.

Mr. Moore: Kevin Moore for the Government.

Mr. Russ: James M. Russ, on behalf of Mr. Wasman.

The Court: Mr. Russ.

Mr. Russ: Morning, Judge Roettger. Mr. Wasman is here.

The Court: I have reviewed the Presentence Report, Mr. Russ, together with all the enclosures, attachments to it.

Have you had a chance to review the P.S.I., sir?

Mr. Russ: Your Honor, the Presentence Report dated the 9th of October was forwarded to Orlando and I had the opportunity on Monday morning of this week to read it, and after reading it, I prepared a supplement containing my thoughts and [3SR4] observations which I forwarded to the Court which the Court should have received yesterday.

The Court: Well, I have not received them. Have you a copy, Mr. Russ?

Mr. Russ: Your Honor, you should have received the package yesterday which contained the original of that and also a piece of correspondence.

The Court: Alas, the mails are—

Mr. Russ: No. This was sent by courier.

The Court: Does anyone on the staff know?

Mr. Russ: I am holding a receipt in my hand that says you got it.

The Deputy Clerk: Who signed it?

Mr. Russ: It doesn't say.

The Court: I hate to delay it but I hate worse to review extensive material on the bench and feel any time constraint, even subconsciously, by doing that. I am going to take a recess and review your copy, if I may.

Mr. Russ: I would appreciate that, Your Honor.

The Court: I think it's much better to do this in the relaxation of chambers than out here. A brief scanning, I see some duplication with what I have already read. So it should not take me all [3SR5] that long. And I ought to be able to read it rather rapidly. Certain areas just to refresh my memory.

Court is in recess.

(Thereupon, a recess was taken, after which, the following proceedings were had):

The Court: Apparently, Mr. Russ, it's down in the Clerk's Office.

Mr. Russ, for the record, to take care of some housekeeping matters while counsel are present, and also the

Defendant is present, judgment of acquittal, motion for new trial. I also want to make sure the record reflects that I am amplifying the rulings I made in connection with the Government's motion to exclude certain testimony as irrelevant and I don't have that in final form yet, but specifically reserving the right to enter that on a nunc pro tunc basis and expect to have it done within a week or ten days.

Before we get back to the P.S.I. and enclosures, I have a motion also for protective order, Malcolm Williams and Sentinel Star Company, who apparently is the publishing company for the Orlando Sentinel, Orlando Star, I'm not sure which, or both.

[3SR6] Mr. Russ: Your Honor, I treated that matter in the letter that is contained in that supplement that I handed up to you.

The Court: The article is in here and it's also attached to this motion for protective order.

Mr. Russ: As I explained to you in the supplement to the Presentence Investigation Report, the newspaper article I felt gave support and corroboration to what I had represented to you and to the jury in the course of the trial. And when I noted the news article in our local paper, I caused a subpoena to be placed on the writer of the article which in turn brought about the motion for protective order filed by the news reporter and by the publisher. As I stated to you, I felt that the record is clear enough, that it wasn't necessary to get off on a collateral First Amendment, Sixth Amendment controversy, so based on that I made the decision to withdraw the

subpoena and so advised the attorney for the news reporter.

The Court: Very well. The matter is moot then as to the subpoena issued to the reporter [3SR7] of the Orlando papers.

What is the status now on the material? My understanding is my secretary did sign for a parcel yesterday.

Mr. Russ: It would appear that in all likelihood it is in your office someplace but it's simply the original of which you have before you. There is one other item which was a letter, a personal letter from Mrs. Wasman to you, which I did not know the contents of. However, Mrs. Wasman is here and I do desire to have her address the Court at the appropriate time in the course of the sentencing, Your Honor.

The Court: Very well.

It's always a source of some embarrassment when papers are mislaid somewhere in chambers or offices of the Court or the Clerk.

If we can proceed without it, let's do so.

Mr. Russ: All right. May I at this time call Mrs. Mildred Wasman.

The Court: Very well.

Mr. Russ: Mrs. Wasman, will you come forward.

The Court: Mrs. Wasman, I apologize that I haven't had the chance to read the letter.

Debbie, will you please administer the oath, [3SR8] please.

(Witness sworn.)

Mrs. Wasman: The letter you didn't receive took a great deal of emotional effort because it made it necessary for me to sit down and review some terrible years. In that letter, I told you that when you sentenced Milton Wasman, you really are sentencing two people because I have been party to everything that's ever happened to him. I have been part of his life and I have been made a part of this nightmare we have gone through for the past five years.

I have been used as a lever by the people who started this whole horrible nightmare and it all started because greedy people didn't get enough. It involved land that had come in part to my children and me as a result of money that was left by my mother-in-law. It's land that my husband worked for years to hold onto and to develop. And when he met with these people with whom he became involved, it was with a goal in mind of developing something wonderful.

These people became our friends. They were in my home. I became friendly with their wives. But then, when things began to go bad, [3SR9] circumstances beyond our control, the world money situation, the recession, and my husband wanted to call a halt, they wouldn't do it because they had a good thing. And then my husband began to suffer consequences of being gullible and having poor business judgment. And that's his crime.

We handed over hundreds and hundreds and hundreds of acres of developed land with the understanding that they would leave us in peace and not continue to threaten and pressure. It was pressure that I had seen cause my husband to have a stroke. I, at one time, told them if they didn't stop trying to use me, if necessary,

I would leave my husband in order to not be used against him. But I guess they knew me very well. They agreed that if I did this, that would be it, they would help to satisfy the claims of the people who had invested. But they didn't do that. They took that land and used the proceeds to line their own pockets and then came back and I have been faced with lawsuit after lawsuit after lawsuit aimed against me. And they were just for the purpose of creating pressure. They kept getting thrown out and new ones came.

[3SR10] These are people who have used blackmail and threats. I've received a telephone call one Sunday morning at 7:00 o'clock from Mr. Connolly in England who threatened that this very thing would happen unless we paid them $50,000 for himself. I couldn't believe it. I couldn't believe that this system that was supposed to protect us would be used against a good man, a perfectly respectable good man, who's guilty of not being able to know what's best for himself. None of this need to have happened if he had been as greedy as the others because he would be vulnerable. I have been party to listening to the threats to feeling pressure.

At the age of sixty-one, we have lost five years out of our lives. It's been torture. Lost the future. I had to go to work. I took the day off because we have no income. My husband has lost his practice, his reputation, his health. How much more punishment, how much more punishment do we have while the people who openly admit what they have done and why they have done it are protected?

I have grandchildren who—That man is the [3SR11] most wonderful, warm, loving human being who's ever

been. We are stable people. We have lived in the same house for thirty-nine years. We have lived in the same community. We are the people the system is supposed to be for and we have been made victims of it. And I find myself completely lost as to how such things could be. The newspapers. The newspapers. We have had no way to combat it. It's like something out of a bad story. We have been stymied at every turn because we just had to struggle to survive.

I think I said it better and less emotionally in my letter. I'm sorry you didn't get it.

The Court: You need not apologize at all.

Mrs. Wasman: But it's like everything else that's happened.

Please, Your Honor, I beg you, look at the whole picture, look at the people.

The Court: Thank you, Mrs. Wasman. You are, indeed, a lovely lady. I doubt the letter could be nearly as dramatic, effective as your able presentation.

Mr. Russ, are you ready to proceed?

Mr. Russ: Yes, Your Honor. Mr. Wasman would like to address the Court.

[3SR12] The Court: Very well.

Mr. Russ: Mr. Wasman.

The Court: Mr. Wasman, you may say anything you like in your own behalf, anything at all in mitigation of punishment.

(Defendant sworn.)

Mr. Wasman: I guess my wife has sort of expressed in a broad sense what has been for us an ordeal. My wife didn't go into great details of what probably would be the interesting story that Your Honor missed at trial, but it would not really add much to that aspect.

I guess the best thing I can tell you is that I have lived here all but seven years of my life, and, as Mildred pointed out, we built our house in 1941 and we have lived in it ever since, and I have been active in the community, have enjoyed and relished and reveled the friendship and respect that I have had in the community, and I am frank to tell you that it has remained to a great extent.

I have received letters from people, I have received requests from people who wanted to write letters on this matter but I felt that in discussing the matter with Mr. Schwartz, that enough [3SR13] was enough and too many would be just redundant. So that it has in a way paid off.

I realize that I am here before you as a result of a stupid situation in which I entered into to try to alleviate the problems we had. Not done with the purpose of taking anything from anybody or doing anything to anybody, but done only for a commission which was promised me. I was assured if I would cooperate with Mr. Comninos, he would like to cooperate with me because he felt that his associates over here were defrauding him. I now recognize that Mr. Comninos feels that everyone with whom he does business, if they don't give him full participation, is defrauding him. I accepted his invitation initially to go see him for that purpose and that purpose alone. Had no other business interest involved. When I invited him to come back—And I had arranged to bring Mr. William Loucks, an attorney in Daytona, along for the purpose of

discussing the matters he was interested in because Mr. Loucks was familiar with it and I felt that between us we could eliminate this four-and-a-half, five years of harrassment, extortion and blackmail.

[3SR14] Several times, I received phone calls, not from thugs, not from gangsters, but from members of the bar, who were hired by these people, threatening to kill me, and my wife was called, told the same thing, unless we capitulated and turned over more land.

They filed innumerable lawsuits alleging fraudulent conduct, couldn't support it and the case—

The Court: Who filed these lawsuits?

Mr. Wasman: A gentleman in Orlando.

The Court: Against you?

Mr. Wasman: Against me and my wife and everybody that ever worked for me or with me or they knew. None of which he could support, and the cases were dismissed. They would refile them. But what he did was he made them so lurid that the newspapers and Mr. Williams, who has written that article, had a field day. And, as a result of that field day, he kept pressing and insisting that state agencies take some action. They finally did. They filed charges. Mr. Russ filed a number of motions to dismiss and they granted the first one. There are several more which are valid that were not necessary to grant, but there is no basis [3SR15] whatsoever to grant except that they were under pressure, and you know, when you're in a political office and a newspaper that is very powerful throughout the state is pressuring you, you better do something or you're going to get some

static. And I say this to you as a fact not a feeling. I tell you how I feel when I feel, but I tell you this is not a feeling.

These are the reasons I went to meet Mr. Comninos, and then he induced me to help him, and if I would help him, he would come over, and I felt that I would have somebody who could verify some of the things that he claimed had been frauds perpetrated on him and his people since we had turned the property over to them for the purpose of having them develop it. He was upset because his associates immediately thereafter put mortgages on everything they could and kept the money and put him in the picture. So he was a very frustrated gentleman and I thought it would be mutually advantageous if we put what we knew together. And that was my purpose in going to see him. Had nothing to do with land or Arabs or anything like that. And then I agreed to help him because that was [3SR16] the one point which he would come and participate and work with Mr. Loucks. And then, after that, I got nothing. They started the extortion, blackmail.

I was kidnapped. I was induced to go, invited to go to Marbella, Spain, told I was to meet somebody. I went to the house with them and then they bound me, hand and foot, and kept me there and made all sorts of threats. They were going to—when I think of this, I am amused because it must have come from Mr. Manning, who is referred to in my experience as Mr. Connolly. Mr. Manning was the man with whom three other people from Curran's office in New York arranged the kidnapping. He told me that if I didn't produce a million-and-a-half dollars for him, that they were going to have some

fishermen pick me up in a boat, put me under the floorboards, take me out to sea, keelhaul me, and then if I didn't succumb to their wishes, they would tie an anchor to me and throw me overboard. I smile at that because keelhauling, I though, had been abolished as a technique in the revolutionary days.

Anyhow, I was interested in that article [3SR17] which I think Your Honor has seen because he said I was stubborn. I guess that's a good word to describe someone who cannot comply. He might as well asked me for the moon and insist that I deliver it immediately because I couldn't, and I told him so but he didn't believe me. And they negotiated and they promised me—They made me a deal. I did not make them a deal. They offered me a deal that if I would give them some land, and I believe the amount was three quarters of a million dollars in land, free and clear, good title, put it in a Swiss corporation who had a registered name or something I couldn't trace or something like that, they would let me free, if I promised to do it; and if I didn't do it within thirty days, they would put out a contract on me. He was very insistent asking if I knew what a contract meant. I told him I had been to a number of gangster movies in my lifetime and I understood perfectly well what it meant. He said "Well, you have that." I received innumerable phone calls concerning that, plus concerning the fact that he wanted $25,000 from me to begin with for himself. And then when he found out that I had called the hotel and told them what had [3SR18] happened and asked them to please send the bill to me, I would pay it, and they should then send my clothes and things, he wasn't able to get those things as he—I don't know what he

thought they were worth—he then raised the ante to $50,000.

I talked to Mr. Putz at the FBI about it, what instruction I should follow. He said "Tape the conversations," which I did, "and we'll see if we can get jurisdiction to do something." I endeavored to call him subsequently. And, for a long time, I had to have somebody go with me wherever I went or follow me so that I would be protected, at least. I thought that they meant it.

As a result, the newspaper publicity effectively destroyed my practice. I am going to have to close the office in the next two weeks and do something working for somebody, if I can, or whatever.

As you can well imagine, I have a health problem which I am trying to overcome. I am not going to permit it to incapacitate me. I just don't believe—

The Court: I'm sorry, your voice dropped.

[3SR19] Mr. Wasman: I am not going to let it, permit it to incapacitate me. I am going to do what I can. And I am working with a doctor now who says that if I am very careful and eat exactly what he prescribes and take the proper medication and take a special exercise series, that I have to follow rigorously—I shouldn't say rigorously, but continuously, that will alleviate whatever the problems are, somewhat. So I do it and I must say I have noticed some improvement and I am, you know—Anyhow, that's where I am, sir.

The Court: Very well, Mr. Wasman.

Mr. Wasman: Thank you.

The Court: Let me ask you one question. Who is Barbara Bucci? Is she a friend or employee or what was her station?

Mr. Wasman: No. She's a lady that I have known for a few years. She owned a half interest in a pizza restaurant and I handled some matters there for them until recently when she had a flare-up with her partner and quit there.

She helps me in one item of some real estate management that we had set up some years ago or had been helping me. She doesn't anymore.

The Court: She was not an employee?

[3SR20] Mr. Wasman: No, sir. She is not and she never has been.

The Court: Thank you, sir.

Mr. Russ: Judge Roettger, that's all I have. If you have any questions of me. I realize this is somewhat of a complex, as we described earlier, bizarre fact pattern.

The Court: It is bizarre.

Mr. Russ: Is there anything that's in doubt in your mind that I can answer? I'd be pleased to do it.

Thank you.

The Court: No, I have nothing. No questions.

Anything from the Government, Mr. Moore?

Mr. Moore: Yes, Your Honor.

Your Honor, I had prepared some comments here at the beginning, primarily for the sake of Mrs. Wasman, but I think they are appropriate in any event.

My comments here are an obligation to another interest, and my comments cannot be cast in the emotion that Mrs. Wasman displayed, and yet I think that they carry equal weight. We take no satisfaction in the suffering of either Mrs. [3SR21] Wasman or, for that matter, the victims of the fraud that caused the false statement to be made in the first place.

There is no such thing as a typical case. When it comes to sentencing, I think that's particularly so where there is an attorney involved. I believe that there are substantial facts in this case which dictate, I believe, a substantial period of incarceration.

Mr. Wasman has cast himself in a certain image that he would like this Court to believe which I believe is false. And that is the image of a victim of a fraud and of a man who is gullible in business affairs and who has been caught up in an isolated instance of a minor transgression of the law. And I think that on each of these counts, the facts belie the image that he would like this Court to believe.

Mr. Wasman is before the Court as an attorney, an attorney of some years of practice in this area, and I think with any attorney, there is an expectation of a knowledge of law, particularly the criminal law that we do not automatically assume with other individuals. I think we hold them to a higher standard. I think that, as a [3SR22] profession, they ask for certain privileges and are accorded certain privileges and they must also individually and collectively bear the responsibilities and duties of the profession. The reputation of the profession suffers when individuals such as Mr. Wasman who bear the cloak of attorneys use their position and commit the

violations or whatever they may be of law. I think for that reason alone, incarceration is warranted because it alerts to the public that there is an awareness on the part of the judiciary that when one of their own commits a violation he will not be treated lightly.

The suggestion of a poor business judgment is, I believe, another characterization of what is really his disregard for what the law is. Mr. Wasman is not new. He's been before the Court on criminal matters. I think it is a matter of importance in assessing in whether this is an isolated instance, whether there is the character of the individual that extends beyond the isolated instance to suggest that Mr. Wasman has had a continuing disregard for the law; and I refer to his prior conviction on a tax matter. Mr. Wasman was convicted there. At that time, it is my [3SR23] understanding that the medical issues were raised as they were in this case, pretrial, as they have been now. I believe Mr. Wasman's knowledge of the law has given him the insight that seeing the benefits from a litigating standpoint to raise the medical issues. I am not suggesting that they do not exist but I do not believe that they have impaired his ability to act in a daily routine. They have served his interest in avoiding responsibility for answering to the charges that he has faced in the past and I do not believe that they should be used as an opportunity to avoid answering for the charges that he stands before the Court today.

It is my understanding that at the time of his past sentencing, he was only one of a number of individuals that the Internal Revenue Service directed their efforts at, that did not receive a period of incarceration. Your

Honor, again with respect to the medical, before I move on to another point, this matter was again raised, and I alluded to the indictment that is still pending in front of Judge Gonzalez in this District, the medical problems were raised there.

I think that the charges there, while not [3SR24] resolved, again point to the question of the context of Mr. Wasman's own participation in the fraud scheme where a lot has been said as to how Mr. Wasman got involved in the scheme. Suffice it to say that a grand jury, at least, has seen fit to disbelieve Mr. Wasman's own version at least at this point.

Your Honor, the suggestion that this is an isolated act, I think, when we look at the facts of this case, we see a very sophisticated individual having a disregard for the law, willing to engage in a number of separate acts in order to further his own interest in that in making a false statement on the application, he saw fit to obtain a birth certificate in the name of another, obtain a driver's license in the name of another, have another individual assist him in the participation of the offense. All of these facts and circumstances, I think, suggest that there was some premeditation in the offense he was committing. Moreover, by the time the offense was charged, the passport in the name of Hendrick was not in the possession of the Government, we subsequently obtained it. And hearing the other facts in the case, I think we [3SR25] can see now that there were other offenses committed, as well, in furtherance of the scheme to defraud certain Arab investors or so-called Arab investors, which Mr. Wasman was apparently willing to engage in. And that was the use of the passport which was a separate

offense, as well as the obtaining of the passport after having made the false statement on the application.

Briefly, Your Honor, I don't think that Mr. Wasman has demonstrated anything that entitles him to the mercy of the Court. I believe a substantial period of incarceration is warranted both on the basis of Mr. Wasman's conduct in this case, his prior conviction and the deterrent effect it would serve on other attorneys, as well as other individuals.

Thank you, Your Honor.

The Court: Thank you, Mr. Moore.

It doesn't have any effect upon the sentencing but it is my understanding that Mr. Comninos was killed after the trial, driving to the airport.

Mr. Moore: Your Honor, there's been a number of personal hardships that I did not bring up [3SR26] which I know the Court does not want to consider them in sentencing.

The Court: I don't consider them but I am curious. This case seems replete with colorful facets.

Mr. Moore: Mr. Sergeant from the Carlton Tower Hotel came to the United States and while here suffered a heart attack on Saturday during the trial.

Mr. Comninos and Mr. Manning, while returning to Miami, were in an accident. Mr. Comninos was fatally killed in that accident and Mr. Manning fortunately suffered a concussion and was released a few days after his hospitalization and now is back in Europe.

The Court: Very well.

Mr. Russ.

Mr. Russ: Your Honor, may I reply to two points?

The Court: Yes, sir.

Mr. Russ: I failed to clarify in my supplement to the Presentence Investigation that the tax matter that Mr. Wasman was convicted on in the early 1970's involved the misdemeanor offense of failing to file a tax return, and that was [3SR27] before Judge Scott in Jacksonville. And he was one of a number of professionals in Southern Florida who were charged as part of an Internal Revenue Service campaign and he was before the Court and entered a plea of guilty to that charge and he received a sentence of probation. Failure to file the income tax return flowed from the situation where the person who had prepared the tax return had represented to Mr. Wasman that the tax return had, in fact, been filed. He believed that it had been filed but, in fact, it had not been.

Second point I'd like to respond or rebut is that the suggestion on the part of the prosecuting attorney that Mr. Wasman is involved or has been involved in a large scheme involving fraud. The Government has brought an Indictment to that effect more than a year ago in this Court. The Government has not seen fit in more than a year, despite the Speedy Trial Act, despite protections of the Sixth Amendment, has not seen fit to bring Mr. Wasman to trial on that charge.

The Court: Didn't you file a motion for continuance, citing health reasons of Mr. Wasman?

Mr. Russ: No, sir. First of all, I don't [3SR28] represent Mr. Wasman in the mail fraud case.

The Court: Are you aware of whether or not he has filed a motion for continuance on that basis?

Mr. Russ: I don't know. And if the prosecutor represents that, I do not challenge that because I do not know. But I am simply making the point that the Government attempts to paint with a broad black brush here and suggests that somehow Mr. Wasman comes before this Court tainted by virtue of a grand jury indictment where Mr. Wasman was not before the grand jury. Mr. Wasman has never had his opportunity to tell that grand jury or a Court or a jury or anybody else in a position to make a decision on this matter what his position and his version is of that matter.

So I, in rebuttal, respectfully suggest it's not appropriate for the Government to be arguing that Mr. Wasman is entitled to some sort of enhanced punishment in this passport case by virtue of the fact that there is a pending grand jury indictment for mail fraud.

The Court: I don't consider pending cases in determining sentence because my theory of [3SR29] sentencing is simply that one can consider prior convictions, and each judge who has somebody with more than one conviction should consider it, not only may, but should consider prior convictions, give whatever weight that judge feels is appropriate, but if judges at the time of considering prior convictions also consider pending cases, and then if that pending case resulted in a conviction, one of the sentences would inevitably have been a pyramided sentence. Consequently, I don't consider pending cases on that basis.

I think it is proper that they be in the Presentence Report and the appellate courts have upheld the consideration of pending matters as I understand them.

Mr. Russ: That is all I have.

Mr. Wasman is prepared for sentencing at this time.

The Court: I have considered a number of factors here and many things to consider in this particular case. The Defendant's age and health is, of course, a mitigating factor. His status as a member of the bar is, of course, an aggrevating factor. I know that sounds Calvinistic [3SR30] but I think it's more or less an accepted principle in this country. We all hear the complaint voiced that people with possessions receive more lenient sentences than people without means, and they can point to examples that seem to indicate that. There are other examples, of course, that indicate the opposite, in that a plumber will receive probation for the same offense for which a lawyer will receive jail time.

There is, of course, the matter of prior conviction. The conviction is within ten years. And the P.S.I. does not reflect whether there were such mitigating factors as suggested by counsel.

The actual offense, itself, is a classic example of criminal bad judgment. Not something that occurs on the spur of the moment but took some individual diligence and effort to obtain the driver's license that's false and the knowing false passport application. Somehow there is some revulsion inherent in a situation where someone utilizes the name of a dead acquaintance. Perhaps it's ghoulish conduct. It's not as reprehensible to my way of thinking as utilizing the [3SR31] name of a dead relative which I have had before me, too.

And I must consider the purpose, the motivation. Although that is not relevant at the time of trial, it is relevant at the time of sentencing. If the motivation were to get a clean passport, as that phrase is used in order to facilitate importation of narcotics because one had made too many trips to a source country on his own passport, that type of motivation, I think, merits substantial incarceration. And although there is some reprehensible aspect about the bigotry involved and trying to dupe Arab investors, perhaps there is some mitigating factor because the clear bigotry involved is on the part of Arabs towards people of Jewish background. I am not condoning it by that conduct. I am certainly not condoning bigotry either way. But the motivation for obtaining this passport is not as heinous as many other situations that do come before federal courts.

I inquired as to whether the corroborating witness was an employee. Some curiosity about that because I have no use for people who take advantage of an employee and involve them in [3SR32] conduct for which the witness could have been indicted. That wasn't the case. It's still reprehensible. When it involves a friend, it is not as reprehensible.

I am going to impose a split sentence in this case, maximum period of incarceration.

In the case of United States of America vs. Milton Wasman, the Defendant having been adjudicated guilty pursuant to the jury verdict of guilty, it is adjudged that the Defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of two years, and on condition that the Defendant be confined in a jail-type or

treatment institution for a period of six months. The execution of the remainder of imprisonment is hereby suspended and the Defendant is placed on probation for a period of three years to commence upon the Defendant's release from confinement.

You have a right of appeal, Mr. Wasman. Your appear should be filed within ten days. You may file a notice of appeal even if you don't have the funds to pay for it, prosecute an appeal along that basis.

[3SR33] The Clerk may be directed to file a notice of appeal in your behalf.

Mr. Russ, you are instructed to remain as his counsel and advise him of his rights as to an appeal if he desires to take an appeal.

Mr. Russ: Yes, Your Honor.

The Court: I am going to defer the reporting time until November 23, 1979, at 10:00 o'clock in the morning, at which time you should report to the institution designated by the Bureau of Prisons at your own expense, or if you do not elect to do so at your own expense, you should report by that hour and date to the Marshal's Office in Miami, Florida, 300 Northeast First Avenue.

Bond continued on the same terms and conditions until the time of reporting.

Mr. Russ: Judge Roettger, may I make several requests of you?

First, as regards the matter of the Court suggesting to the Attorney General as to a suitable place of incarceration.

The Court: I would recommend Eglin Air Base, which seems most appropriate under the circumstances.

Mr. Russ: Thank you.

[3SR34] And assuming Mr. Wasman wants to take an appeal, and we will have to discuss that after this court session, I would respectfully ask the Court to stay the execution of the sentence in the event a notice of appeal is timely filed.

The Court: I have stayed the execution until November 23rd for reporting.

Mr. Russ: But I'd like you to, in the event the notice of appeal is filed, to allow him to continue on his same bail he is out on.

The Court: Can't be on the same bond but I will set a supersedeas if that's what you're asking—

Mr. Russ: That's what I'm asking, yes, Your Honor.

The Court: What bond is the Defendant on now?

Mr. Russ: $50,000 personal surety, Your Honor?

The Court: Mr. Moore? Anything from the Government?

Mr. Moore: Your Honor, the Government would oppose it.

The Court: Pardon?

Mr. Moore: The Government would oppose it.

The Court: Do you have any reason to believe that he is involved in some kind of bildking [3SR35] operations or scams?

Mr. Moore: No, Your Honor.

The Court: I don't think he is likely to flee. Man lives in the same house for thirty-nine years is not likely to leave it. And I don't know that he is a threat to the community in view of the fact that you cannot advise me of any such operations. I cannot, from the nature of things, make that finding; therefore, I will set a supersedeas bond. I will set it in the amount of $5,000 corporate surety and an additional $50,000 personal recognizance. That, of course, is a supersedeas bond.

Mr. Russ: Yes, Your Honor.

The Court: Present bond continues in full force and effect on the same terms and conditions until the time of reporting. Notice of appeal is filed, $5,000 personal surety and $50,000 personal recognizance.

Mr. Russ: Yes, sir.

The Court: Anything further to come before the Court?

Mr. Russ: I have nothing further, Your Honor. Thank you.

The Court: Good luck to you, Mr. Wasman.

[3SR36] Court is in recess.

(Thereupon, the foregoing proceedings were concluded.)

CERTIFICATE

STATE OF FLORIDA
COUNTY OF BROWARD

I, RUDY E. FOX, Official Court Reporter, do hereby certify that the foregoing transcript, consisting of

pages numbered from 1 to 35, inclusive, contains a true and correct transcript of my shorthand notes as taken by me from a recording of the proceedings that took place and the time and place aforesaid.

DATED at Fort Lauderdale, Florida, this 24th day of March, 1980.

/s/ RUDY E. FOX
Official Court Reporter

No. 83-173

In the Supreme Court of the United States

OCTOBER TERM, 1983

MILTON R. WASMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court properly enhanced petitioner's sentence on retrial to take into account an intervening conviction.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals affirming petitioner's conviction and sentence on retrial (Pet. App. A1-A32) is reported at 700 F.2d 663. The opinion of the court of appeals reversing petitioner's initial conviction is reported at 641 F.2d 326 (5th Cir. 1981).

JURISDICTION

The judgment of the court of appeals was entered on March 17, 1983, and a petition for rehearing was denied on June 2, 1983. Pet. App. A68-A69. The petition for a writ of certiorari was filed on August 1, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of knowingly and willfully making a false statement

in a passport application, in violation of 18 U.S.C. 1542. He was sentenced to two years' imprisonment, all but six months of which was suspended in favor of three years' probation. On appeal, the conviction was reversed. 641 F.2d 326 (5th Cir. 1981). On retrial, petitioner again was convicted by a jury, but this time he was sentenced to two years' imprisonment without suspension of any portion of the sentence. The court of appeals affirmed. Pet. App. A1-A32.

1. The evidence adduced at the second trial showed that on March 1, 1978, petitioner applied for a United States passport in the name of David Hibbert Hendrick, Jr. Petitioner told the passport examiner that he had forgotten his wallet and therefore had no identification, but that his secretary would swear out an affidavit identifying him as Hendrick. Petitioner then filled out a passport application in the name of Hendrick. In addition to the false name, he gave a fictitious date of birth, place of birth, next of kin, mother and father. He also reported that he had never been married and that he had never previously been issued a passport, although, in fact, petitioner was married and possessed a current passport in the name of Wasman. Petitioner signed the passport application and swore that the statements he had made therein were true and correct to the best of his knowledge. He also informed the passport examiner that he intended to travel abroad within the next few days and that he therefore needed the passport as soon as possible. The passport was issued and petitioner's secretary picked it up the next day (Tr. 76-82, 93-96; G. Exhs. 1, 2, 6).[1]

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[1] References to the trial transcript and exhibits and to the first sentencing hearing are taken from the government's brief in the court of appeals. References to the first sentencing hearing are designated herein as "I S. Tr."; that transcript of the hearing was contained in the third volume of the supplemental record in the court of appeals ("3 S. R.").

In order to rebut petitioner's claim that he had legally assumed the name "Hendrick," the government introduced evidence showing that, after posing as Hendrick to obtain the passport, petitioner continued to use the name "Wasman" for other purposes. For instance, on the same day that he applied for the passport, petitioner also applied for a renewal of his driver's license in the name of "Wasman." He applied for a duplicate copy of the license two months later, again using the name "Wasman" (Tr. 128-130; G. Exhs. 20-22).

In defense, petitioner claimed that he needed a passport in a non-Semitic name in order to sell Florida real estate to a group of Arab investors (Tr. 194-224, 228-241, 252-259, 268, 284-289, 293-298).

2. At the sentencing hearing following petitioner's conviction at the first trial, the government advised the district court that petitioner had one prior conviction for failure to file a tax return and also was under indictment on four counts charging mail fraud (I S. Tr. 23-24). The court granted defense counsel's request that it not consider the unresolved mail fraud charges (I S. Tr. 28-29):

> I don't consider pending cases in determining sentence because my theory of sentencing is simply that one can consider prior convictions, and each judge who has somebody with more [than] one conviction should consider it, not only may, but should consider prior convictions, give whatever weight that judge feels is appropriate, but if judges at the time of considering prior convictions also consider pending cases, and then if that pending case resulted in a conviction, one of the sentences would inevitably have been a pyramided sentence. Consequently, I don't consider pending cases on that basis.

The court then sentenced petitioner to two years' imprisonment, all but six months of which was suspended in favor of three years' probation (*ibid.*).

The pending mail fraud indictment subsequently was dismissed and a one-count information was substituted charging petitioner with possession of counterfeit certificates of deposit. Following his plea of nolo contendere, petitioner was convicted on the counterfeit certificates charge and was sentenced to two years' probation.

Thereafter, petitioner's initial conviction on the false passport charge was reversed. 641 F.2d 326 (5th Cir. 1981). Following his retrial and reconviction, petitioner was sentenced to two years' imprisonment, none of which was suspended. Pet. App. A33-A66. The court explained (*id.* at A42-A59) that it had altered petitioner's sentence to take into account his intervening conviction on the counterfeit certificates of deposit charge. The court stated (*id.* at A58):

> At the time of the first sentencing, I just thought that Mr. Wasman was one of those people who couldn't see the out-of-bounds lines very clearly and didn't care too much which side of it he was on.

But, since the first sentencing hearing, petitioner had been found guilty on the counterfeit certificates charge. In the court's view, this additional conviction shed new light on petitioner's character and rendered a partially suspended sentence inappropriate. *Id.* at A42-A59.

3. The court of appeals affirmed petitioner's conviction and sentence. Specifically, the court held (Pet. App. A15) that the modification of petitioner's sentence on retrial was not motivated by judicial vindictiveness and comported with the guidelines for enhanced sentencing established by this Court in *North Carolina* v. *Pearce*, 395 U.S. 711 (1969):

> [The district court] followed precisely the procedural steps of *Pearce*, affirmatively stating on the record his reason for enhancing the sentence, basing that reason on objective information concerning identifiable conduct of the defendant, and making the factual data on which his action was based part of the record so that its constitutional legitimacy may be fully reviewed on appeal[.]

The court of appeals rejected petitioner's argument based on this Court's reference in *Pearce*, 395 U.S. at 726, to " 'conduct [on the part of the defendant] occurring after the time of the original sentencing' " (Pet. App. A19), that because his conviction on the counterfeit certificates charge was for an offense committed before his first sentencing, it could not provide the basis for enhancement of his sentence. In the court's view (*id.* at A19), that argument "concerns but a part of the means, and ignores the end sought to be achieved in *Pearce*. It exalts words above substance." As the court explained (*id.* at A19-A20, A24):

> [A] rigid limitation of increased sentences to those based on misconduct occurring after the first sentencing would needlessly erase relevant information from the sentencing slate, while contributing nothing to the goal of avoiding vindictiveness. * * *
>
> The target in *Pearce* was vindictive sentencing, not defendant misbehavior between trials. No reason exists for applying a phrase in the *Pearce* guidelines to circumstances bearing no relation to the purpose of those guidelines. There is on this record no evidence whatsoever that the enhancement here resulted from vindictiveness of [the district court]. Nor does [petitioner] argue that it did. In such circumstances, an increased sentence neither thwarts the purpose of *Pearce* and its guidelines nor offends constitutional due process considerations.

After carefully reviewing this Court's post-*Pearce* decisions concerning vindictive sentencing, the court of appeals concluded (*id.* at A26-A27) that "where, as here, the record establishes a total absence of any 'realistic likelihood' of vindictiveness, an increased sentence does not offend the Due Process Clause."

ARGUMENT

Petitioner contends that the court of appeals' affirmance of the enhanced sentence imposed on him following his appeal conflicts both with this Court's decision in *North Carolina* v. *Pearce*, *supra*, and with *United States* v. *Markus*, 603 F.2d 409, 414 (2d Cir. 1979), and *United States* v. *Williams*, 651 F.2d 644, 648 (9th Cir. 1981). As we show below, however, the decision below comports with both the letter and the spirit of this Court's decision in *Pearce*. Furthermore, the singular facts of the present case are distinguishable from those of the court of appeals decisions on which petitioner relies and make it an unsuitable vehicle for further definition of the contours of the *Pearce* prophylactic rule.

Petitioner bases his contention (Pet. 12) that a sentence may not be enhanced on retrial to take into account an intervening conviction unless the underlying offense also was committed during the interim between the two trials on the following emphasized language from the Court's opinion in *Pearce* (395 U.S. at 726; emphasis added):

> [W]henever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning *identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding*.

In a case such as the present one, however, in which, as petitioner acknowledges (Pet. 13-14), the enhanced sentence is the result of the defendant's intervening nolo contendere plea, the enhancement is literally based upon "identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding" (395 U.S. at 726). In any event, petitioner ignores other language from *Pearce* (395 U.S. at 723; emphasis added; citation omitted) that permits a trial court to impose an enhanced sentence following retrial based on

> *events* subsequent to the first trial that may have thrown new light upon the defendant's "life, health, habits, conduct, and mental and moral propensities." Such information may come to the judge's attention from evidence adduced at the second trial itself, from a new presentence investigation, from the defendant's prison record, or possibly from other sources.

As the court of appeals noted (Pet. App. A23 n.6), an intervening conviction clearly is an "event" that sheds new light on a defendant's propensity to violate the law. Accordingly, petitioner's enhanced sentence does not violate even the letter of *Pearce*.[2]

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[2]As the court of appeals suggested (Pet. App. A23 n.6), this Court's references in *Pearce* (395 U.S. at 723, 726) to conduct of the defendant "subsequent to the first conviction" and "occurring after the time of the original sentencing" apparently rest on the assumption that all conduct occurring before the first conviction had been taken into account by the court in setting the first sentence. Such an assumption is inapplicable where, as here, the earlier conduct was deliberately ignored at the first sentencing proceeding. In any event, since in *Pearce* and its companion case the states advanced no reasons for the enhanced sentences, the Court had no occasion in that case to consider the propriety of increasing a sentence on the basis of an intervening conviction for an offense committed before the first sentencing. See 395 U.S. at 726; Pet. App. A22 n.6.

Moreover, petitioner's contention "exalts words above substance" and "ignores the end sought to be achieved in *Pearce*." Pet. App. A19. As the court's post-*Pearce* cases make clear, the prophylactic rule established in that case was designed solely to insure against the hazard of judicial vindictiveness and, thus, against any deterrent effect on a defendant's decision whether to appeal flowing from his apprehension of such a retaliatory motivation. See *United States* v. *Goodwin*, 457 U.S. 368, 372-377 (1982); *Blackledge* v. *Perry*, 417 U.S. 21, 25-29 (1974); *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 24-35 (1973); *Colten* v. *Kentucky*, 407 U.S. 104, 116-118 (1972); *Moon* v. *Maryland*, 398 U.S. 319 (1970) (per curiam). " 'The lesson that emerges from *Pearce*, *Colten*, and *Chaffin* is that the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of "vindictiveness." ' " *United States* v. *Goodwin*, 457 U.S. at 375, quoting *Blackledge* v. *Perry*, 417 U.S. at 27. Permitting a trial court to enhance a defendant's sentence on the basis of an intervening conviction for an offense committed prior to the original sentencing poses no more likelihood of "vindictiveness" than does enhancement of a sentence based on intervening misconduct.

Similarly, this Court's concern that a defendant not be deterred in the exercise of his appellate rights embodies only the limited interest that a defendant not be deterred from appealing *for fear that the trial court would retaliate against him for doing so by enhancing his sentence following retrial*, not the more generalized concern posited by petitioner (Pet. 16-19, 26) that a defendant contemplating appeal should be entitled to assurance that enhancement of

his sentence could result only from his own intervening misbehavior.[3] Hence, the district court's explanation (page 4, *supra*) that petitioner's enhanced sentence was based on his intervening conviction on the counterfeit certificates scheme fully satisfied the spirit as well as the letter of this Court's decision in *Pearce*.

Indeed, as the court of appeals noted (Pet. App. A24), petitioner did not even allege vindictiveness on the part of the sentencing court.[4] In *Moon* v. *Maryland*, *supra*, this Court granted certiorari in order to determine whether the rule announced in *Pearce* should be applied retroactively. The Court dismissed the writ as improvidently granted, however, when it became clear that the petitioner in *Moon* had " 'never contended that [the sentencing judge] was vindictive.' " 398 U.S. at 321. Likewise, the Court should not grant the petition here to construe the rule of *Pearce* in the absence of even an allegation of actual vindictiveness.

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[3]See, *e.g.*, *Colten* v. *Kentucky*, *supra*. There, the Court refused to apply *Pearce's* prophylactic rule to an allegation of vindictiveness that arose in a case involving Kentucky's two-tier system for adjudicating less serious criminal charges, whereby a defendant who is convicted and sentenced in an inferior court is entitled to a trial de novo in a court of general jurisdiction, notwithstanding the fact that the latter court "often • • • will impose a punishment more severe than that received from the inferior court." 407 U.S. at 117.

[4]Petitioner suggests (Pet. 20 n.3) that the transcript of the second sentencing proceeding "reveals strong negative feelings against [petitioner]" on the part of the district court. The type of "negative feelings" advanced by petitioner, however —the alleged displeasure of the district court with the sentence imposed on petitioner as a result of the intervening false certificates conviction — has nothing to do with the vindictive retaliation for the taking of an appeal against which *Pearce* and its progeny were directed. Moreover, at the sentencing proceedings on which petitioner relies (Pet. 20 n.3), petitioner's counsel apparently eschewed reliance on the type of vindictiveness with which *Pearce* and related cases were concerned (Pet. App. A45): "First thing is really I'm not suggesting a more harsh sentence, you know, penalize Mr. Wasman for going to trial."

At all events, unique circumstances are present in this case that take it well outside the reach of the *Pearce* prophylactic rule and make the case wholly inappropriate as a vehicle for resolving any unsettled issues regarding the scope of that rule. Pursuant to petitioner's own request, the conduct that underlay his intervening conviction was not considered by the district court at the first sentencing hearing. At that time, petitioner urged that misconduct should not be a factor in sentencing unless and until it resulted in a conviction. By explicitly excluding from the sentencing calculus consideration of the counterfeit certificates scheme, the district court merely followed the procedure suggested by petitioner; this dispels any suggestion that the enhanced sentence following retrial, at which time the previously pending charges had been resolved, was the result of judicial retaliation for the appeal. Especially in these circumstances, *Pearce* should pose no barrier to an enhanced sentence based on an intervening conviction.[5]

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[5]Petitioner also contends (Pet. 21-26) that his sentences have been improperly pyramided because the judge who sentenced him on the intervening counterfeit certificates conviction took into account his conviction at the first passport trial, while the sentencing judge at the second passport trial, in turn, increased his original sentence on the basis of the intervening counterfeit certificates conviction. This contention is factually erroneous. Indeed, the outstanding passport charge inured to petitioner's benefit at the sentencing on the intervening counterfeit certificates conviction. In choosing not to impose a jail term with respect to the latter charge, the sentencing judge explained (Pet. C.A. Br. App. 49; emphasis added):

> I think I am going to be lenient with you really because I realize you have been through a lot *and you do have the [passport] sentence facing you* • • • *on essentially the same [facts].*

Thus, the only one of petitioner's sentences that was enhanced to take into account his proven penchant for fraud was the second passport sentence. In these circumstances, petitioner cannot complain that his sentences were impermissibly pyramided.

For the same reason, the cases relied on by petitioner are distinguishable. In neither *United States* v. *Markus*, 603 F.2d 409 (2d Cir. 1979), nor *United States* v. *Williams*, 651 F.2d 644 (9th Cir. 1981), is there any suggestion that the trial court, in originally sentencing the defendant, expressly agreed to a defense request not to consider allegations of prior misconduct that were the subject of a pending prosecution.[6] Hence, even if *Markus* and *Williams* were correctly decided,[7] they would not necessarily avail petitioner, whose enhanced sentence was the result of the district court's acceptance of petitioner's own argument at the original sentencing proceedings, rather than of any "vindictiveness * * * for having successfully attacked his first conviction." 395 U.S. at 725.

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[6]Indeed, in *Williams* the indictment that resulted in the intervening conviction was not filed until after the first sentencing proceeding. 651 F.2d at 646, 648.

[7]We note our view that *Williams* and *Markus* were wrongly decided. As the court below observed (Pet. App. A28), neither *Williams* nor *Markus* examines this Court's subsequent opinions explaining *Pearce*. Nor do they mention that the *Pearce* opinion itself contemplates the sentencing court's consideration of intervening "events." Instead, like petitioner, they rely on isolated language taken out of context from *Pearce* and conclude on the basis of it that a conviction is not "conduct" and that it therefore will not support an enhanced sentence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1983

DOJ-1983-10

No. 83-173

In The
Supreme Court of the United States
October Term, 1983

MILTON R. WASMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

1. Whether a sentence may properly be enhanced following re-trial and re-conviction after a first conviction is reversed on appeal when that enhancement is based upon conduct of a defendant which occurred prior to the first sentencing hearing?

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OPINION BELOW

The opinion of the Court of Appeals is officially reported at 700 F. 2d 663 (11th Cir. 1983) and appears in the Appendix to the Petition for Writ of Certiorari (A-1 to A-32).[1] The *per curiam* order denying Wasman's petition

[1]Reference to pages in the appendix to the Petition for Writ of Certiorari shall be A—. Reference to pages in the Joint Appendix shall be J.A. —. Reference to the appendix to this brief shall be App. —.

for re-hearing and/or sugestion for re-hearing *en banc* is set out at A-68 to A-69 of that same Appendix.

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was entered on March 17, 1983. A petition for re-hearing and/or suggestion for re-hearing *en banc* was denied on June 2, 1983. A timely petition for a writ of certiorari was filed on August 1, 1983. Certiorari was granted on October 31, 1983. An extension of time within which to file this brief was given until December 22, 1983.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall . . . be deprived of . . . liberty . . . without due process of law . . . .

STATEMENT OF THE CASE

This case calls into review the precepts set out by this Court in *North Carolina v. Pearce,* 395 U. S. 711 (1969) dealing with when a trial court may enhance a de-

fendant's sentence following re-trial and re-conviction after a first conviction has been reversed on appeal.

Petitioner was charged by indictment with wilfully and knowingly making false statements in an application for a passport with the intent to induce and secure the issuance of a passport in violation of 18 U. S. C. § 1542. (1R, p. 1).[2] The case was tried twice and the Petitioner was found guilty each time. There was never really any dispute as to the fact that the Petitioner obtained a passport in the name of another, a deceased law school classmate of his, but rather, through two trials and two appeals, the issue involved his intent and reasons.[3]

In September of 1979, the case was first called up for trial and the Petitioner was found guilty as charged. (2R, p. 327). On October 18, 1979, he was sentenced to two (2) years incarceration, but pursuant to the split sentencing provision of 18 U. S. C. § 3651, whereby he was to serve six months incarceration and then be placed on three (3) years probation. From that conviction, Wasman appealed.

While his appeal was pending in the Fifth Circuit, the Petitioner entered a plea of *nolo contendere* to a misdemeanor charge of possession of false certificates of deposit [18 U. S. C. § 480]. (See Appendix to this Brief

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[2]Record references shall be as follows: (—R, p. —) refers to the Record on Appeal (Volume 1 being pleadings and orders, Volumes 2 through 4 being trial transcripts); (—SR, p. —) refers to the Supplemental Record on Appeal—(1SR, p. —), (2SR, p. —) and (3SR, p. —) denoting, respectively, the First, Second and Third volumes of same.

[3]See proffer set out in the first *Wasman* case, *United States v. Wasman*, 641 F. 2d 326, 328 (5th Cir. 1981) and the background section of the second opinion. *United States v. Wasman*, 700 F. 2d 663, 665 (11th Cir. 1983).

for transcript of change of plea, App. 1-App. 15.) That plea, also entered consistent with the rationale of *North Carolina v. Alford*, 400 U. S. 25 (1970),[4] was a negotiated one, whereby the Government dismissed a mail fraud indictment in return for the *nolo* plea. That mail fraud indictment had been pending at the time of the Petitioner's sentencing in the passport case, the underlying facts having occurred a number of years earlier.

Following a lengthy sentencing hearing in the false certificates case in which it was noted that the charge to which the Petitioner had pled *nolo contendere* was interwoven with the facts of the "passport" case (App. 36, 39), the District Judge, taking into account the then pending passport conviction and sentence, imposed a sentence of two (2) years probation. (App. 39).

Shortly after the sentencing hearing in the certificates misdemeanor case, the Fifth Circuit reversed the first passport case and remanded for a new trial. *United States v. Wasman*, 641 F. 2d 326 (5th Cir. 1981). At that second trial, the Petitioner was again found guilty. (4R, p. 370).

On August 31, 1981, the Petitioner appeared for sentencing. At that hearing, the trial court imposed a sentence of a straight two (2) years incarceration. (See pp. A-33 to A-67 of Petition for Writ of Certiorari for a transcript of the second sentencing hearing; J.A. 4-5 contains the Judgment and Probation/Commitment Order.) At the sentencing hearing, counsel for Wasman urged the trial court not to consider the intervening *nolo contendere*

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[4]A plea of convenience.

plea to the misdemeanor charge pursuant to the case of *North Carolina v. Pearce*, 395 U.S. 711 (1969) in that the facts of the intervening conviction occurred prior to the first sentencing hearing and the related mail fraud indictment was pending at that time. (A-42 through A-65). The trial judge rejected that argument and enhanced the sentence because of the intervening conviction. (*Id.*) On appeal, the Eleventh Circuit affirmed and in so doing noted that it was taking a different approach to the *Pearce* guidelines than did the Second and Ninth Circuits in *United States v. Markus*, 603 F.2d 409 (2d Cir. 1979) and *United States v. Williams*, 651 F.2d 644 (9th Cir. 1981), respectively. *United States v. Wasman*, 700 F.2d 663, 669 (11th Cir. 1983).

SUMMARY OF ARGUMENT

This Court in *North Carolina v. Pearce*, 395 U.S. 711 (1969) stated that due process requires that vindictiveness against a defendant for successfully bringing an appeal must play no part in the re-sentencing process should the defendant be re-convicted. Further, to insure that a defendant is able to make a free and unfettered decision as to whether even to take an appeal, this Court in *Pearce* fashioned a prophylactic rule to take fear of possible vindictiveness out of the defendant's mind when making that decision. That rule required that whenever a judge chooses to enhance a sentence on re-conviction, reasons must be stated in the record based upon objective conduct of the defendant occurring after the time of the first sentencing hearing.

The case presented here asks this Court merely to order the Eleventh Circuit to obey the test set out in *Pearce*. The Court of Appeals, in approving the enhancement, has broken from its sister circuits, specifically the Second and Ninth, and permitted the trial court on resentencing to enhance based solely on an intervening plea of *nolo contendere* to a charge involving facts occurring prior to the first sentencing hearing.

The Petitioner did nothing between the two sentencing hearings except to resolve a pre-existing factual situation in court. He committed no new bad act that should give rise to an enhanced sentence. The enhancement served none of the recognized goals and objectives of sentencing and resulted in an improper pyramiding of sentences.

To allow the actions of the trial judge and Court of Appeals to stand undermines the due process considerations addressed in *Pearce* and instills fear in all those convicted defendants who may have other charges pending. Instead of making a free and unfettered decision as to whether to take an appeal, defendants would be placed in the dilemma of perhaps deciding not to appeal for fear that if re-tried, an enhanced sentence could result if during the interim, they were convicted of pending charges.

ARGUMENT

Enhancement Of Sentence Following Re-Trial And Re-Conviction After A First Conviction Is Reversed On Appeal Cannot Be Based Upon Conduct Of The Defendant Occurring Prior To The First Sentencing Hearing Even If That Conduct Results In An Intervening Conviction.

A. The Pearce test was designed to remove not only actual vindictiveness but also fear of vindictiveness from the re-trial and re-sentencing process.

In 1969, this Court had the opportunity to address the issue of whether the imposition of a harsher sentence following re-trial and re-conviction when a first trial had been reversed on appeal violates the double jeopardy provisions of the Fifth Amendment. In *North Carolina v. Pearce*, 395 U. S. 711 (1969), a majority of this Court held that there was no absolute constitutional bar to the imposition of a harsher sentence upon re-trial. But it was noted that due process requires that vindictiveness against the defendant for exercising his appellate rights must play no part in that enhancement of sentence and that the defendant should be free of fear of vindictiveness that may otherwise deter him from taking an appeal. 395 U. S. at 723-725. To insure such a result, this Court fashioned a prophylactic rule:

> [W]henever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the de-

fendant occurring after the time of the original sentencing proceeding. 395 U. S. at 726.

In setting out such a rule, this Court was concerned not only that actual vindictiveness play no part in any re-sentencing process but also that a defendant should be able to decide whether to exercise his appellate rights free and unfettered from the apprehension that a trial judge would act with a retaliatory motive at any subsequent sentencing. *North Carolina v. Pearce*, 395 U. S. at 724-725. That such a fear of enhanced penalty on re-trial exists could not be demonstrated more poignantly than was expressed in the letter of a prisoner quoted by the trial judge in *Patton v. North Carolina*, 256 F. Supp. 225 (W. D. N. C. 1966), and cited in *North Carolina v. Pearce*, 395 U. S. at 725, n. 20:

"Dear Sir:

"I am in the Mecklenburg County jail. Mr. —— chose to re-try me as I knew he would.

• • • • • • • • • • •

"Sir the other defendant in this case was set free after serving 15 months of his sentence, I have served 34 months and now I am to be tried again and with all probability I will receive a heavier sentence then before as you know sir my sentence at the first trile was 20 to 30 years. I know it is usuelly the courts prosedure to give a larger sentence when a new trile is granted I guess this is to discourage Petitioners.

"Your Honor, I don't want a new trile I am afraid of more time • • •

"Your Honor, I know you have tried to help me and God knows I apreceate this but please sir don't let the state retry me if there is any way you can prevent it"

Very truly yours"

256 F. Supp. at 231, n. 7.

In order to take this fear of enhanced punishment out of the decision making process of a defendant and to remove not only actual vindictiveness from re-sentencing but also the appearance of vindictiveness, the above quoted test was set out in *Pearce* by which the trial court when enhancing a sentence must point to identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.

In the instant case, the trial court looked to the intervening misdemeanor plea of *nolo contendere* as the basis of enhancing the Petitioner's sentence by eighteen (18) months.[5] The question at issue is whether the conduct that may serve as the basis of enhancement is actual physical acts of a defendant (in this case the actual illegal possession of false certificates of deposit) or merely the resolution of that conduct in a court proceeding.

The mail fraud indictment, the forerunner to the false certificates charge, was pending and known to the trial judge in the instant (passport) case at the time of the first sentencing. The only relevant occurrence between the two passport case sentencings was that the mail fraud case was resolved when the Government dismissed the pending indictment and Wasman pled *nolo contendere* to the misdemeanor information filed in its place, a plea

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[5]The original sentence imposed was two years but pursuant to the split sentencing provisions of 18 U. S. C. § 3651, whereby the Petitioner was to serve six (6) months incarceration followed by three years probation. The second sentence involved a straight two year period of incarceration. It is beyond dispute and has been conceded below that the second sentence was an enhanced one over that previously imposed. *See United States v. Williams*, 651 F. 2d 644, 647 (9th Cir. 1981); *United States v. Gilliss*, 645 F. 2d 1269, 1283 (8th Cir. 1981); *United States v. Markus*, 603 F. 2d 409 (2d Cir. 1979).

given (and accepted) with the announcement that it was made consistent with *North Carolina v. Alford*, 400 U.S. 25 (1975), that is, a plea entered as being in the overall best interest of the defendant.

The trial court, while setting forth its reasons as required by *Pearce* for the enhancement, misses the mark as to what this Court was trying to accomplish in that opinion.

Clearly, a trial court cannot punish a defendant for successfully bringing an appeal by automatically enhancing his sentence on re-conviction. *North Carolina v. Pearce*, 395 U.S. at 723. Just as clearly fear of vindictiveness must be removed from the process. *Id.* at 724-725. In fact, this Court in explaining *Pearce* noted that its decision there was not grounded upon the proposition that actual retaliatory motivation must always exist but rather that fear of vindictiveness may unconstitutionally deter a defendant's exercise of his right to appeal. *Blackledge v. Perry*, 417 U.S. 21, 28 (1974). Also, in *United States v. Goodwin*, 457 U.S. 368, 102 S.Ct. 2485 (1982), this Court noted:

> Both *Pearce* and *Blackledge* involved the defendant's exercise of a procedural right that caused a complete retrial after he had been once tried and convicted. The decisions in these cases reflect a recognition by the Court of the institutional bias inherent in the judicial system against the retrial of issues that have already been decided. The doctrines of *stare decisis*, *res judicata*, the law of the case, and double jeopardy all are based, at least in part, on that deep-seated bias. While none of those doctrines barred the retrials in *Pearce* and *Blackledge*, the same institutional pressure that supports them might also subconsciously motivate a vindictive prosecutorial or judicial re-

sponse to a defendant's exercise of his right to obtain a retrial of a decided question.

102 S. Ct. at 2490-2491.

The concern about these possible subconscious reactions to retrials is an important reason for the need for the objective standard of *Pearce*, that is, to take subconscious motivation out of the picture. Whether a judge acts out of actual vindictiveness or with a motive subconsciously derived from the reversal of the first trial is difficult if not impossible to determine. Because of that difficulty, the objective prophylactic test set out in *Pearce* is needed. *See* Note, *Limitations on Sentencing After Reconviction by Jury*, 87 HARV. L. REV. 233, 237-238 (1973).

In affirming the enhancement of sentence that occurred here, the Eleventh Circuit stressed that due process is not offended when there is no showing of vindictiveness or a realistic likelihood of vindictiveness. *United States v. Wasman*, 700 F. 2d 663, 669 (11th Cir. 1983).[6] The Circuit Court, however, overlooked the other very real purposes of *Pearce*, that is, to avoid the appearance of vindictiveness and to remove the apprehension of fear from the mind of the defendant at a time when he must decide whether to take an appeal. In so doing, the lower court has broken from the other Circuit Courts of Appeals that have considered similar issues in the wake of *Pearce*.

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[6]It is hard to conceive that there would ever be a case where a clear cut indication of vindictiveness would appear in a record. A review of the transcript of the sentencing in this case (A-33 through A-67) reveals strong negative feelings against the Petitioner. The trial judge appears to be displeased with the sentence given by the judge in the misdemeanor case and was acting essentially as a reviewing body.

United States v. Williams, 651 F.2d 644 (9th Cir. 1981); *United States v. Markus*, 603 F.2d 409 (2d Cir. 1979).[7] The Eleventh Circuit looked for support to several post-*Pearce* cases of this Court. However, a review of those cases reveals that they do not support the enhancement that occurred here.

In *Colten v. Kentucky*, 407 U.S. 104 (1972), this Court was presented with a case involving a two-tier system whereby a person charged with a misdemeanor may first be tried in an inferior court and, if dissatisfied with the outcome, may have a trial *de novo* in a court of general jurisdiction but must risk a greater punishment if convicted. This Court, in approving the Kentucky system, distinguished *Pearce* noting that a trial *de novo* represents a completely fresh determination of guilt or innocence by a different court than imposed the first sentence. 407 U.S. at 116-117. Further, it was noted that the concerns of *Pearce*—to take vindictiveness and fear of vindictiveness out of the appeal and re-sentencing process—are not present in the two-tier trial *de novo* system. *Id.* at 116. Of course, in the instant case, the Court is not presented with a two-tier system and a request for a *de novo* trial before a different judge. This case involves a straight retrial before the same judge after the first trial and conviction was reversed.

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[7]The *Wasman*, *Markus* and *Williams* cases are compared and discussed in light of *Pearce* in an article now in the final pre-publication stage for the Washington & Lee Law Review. That article, Note, *Intervening Convictions as Support for Enhanced Sentences Following Appeal and Retrial*, 41 Wash. & Lee L. Rev. — (1984) is scheduled for publication in February of 1984. Final proofs will be forwarded to the Clerk of this Court as soon as available.

Chaffin v. Stynchcombe, 412 U.S. 17 (1973), unlike the case *sub judice*, involved a jury-imposed sentencing scheme. This Court held that the Due Process Clause is not offended by the imposition of a harsher second sentence by a jury as long as the jury is not informed of the prior sentence and no other indicia of vindictiveness is shown. 412 U.S. at 35.

Finally, in *Moon v. Maryland*, 398 U.S. 319 (1970), this Court dismissed a writ of certiorari originally issued to consider the retroactivity of the then recent *Pearce* case, when it was stated that no claim of actual vindictiveness on the part of the trial judge was made. But the removal of fear of vindictiveness in the mind of the defendant has always been as much a goal as removal of vindictiveness itself. *United States v. Goodwin*, 457 U.S. 368 (1982); *Blackledge v. Perry*, 417 U.S. 21, 28 (1974).

B. No objective of sentencing is served by allowing enhancement based upon conduct occurring prior to the first sentencing hearing even if that conduct results in an intervening conviction.

With regard to whether enhancement of sentence based upon the precise facts of this case meet the requirements of due process as announced in *Pearce*, it is helpful to review the generally recognized goals and objectives of the sentencing process-deterrence, rehabilitation and punishment.[8]

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[8]See Nagel and Hagen, *The Sentencing of White-Collar Criminals in Federal Courts: A Socio-Legal Exploration of Disparity*, 80 Mich. L. Rev. 1427 (1982).

The first goal is to deter the defendant (and others) from committing new wrongs in the future. As a corollary it may be said that the obvious object of any rule of law, whether legislatively or judicially created, is to make the citizenry more law-abiding. There is no deterrent effect to allowing actions and behavior of Wasman occurring prior to the first sentencing hearing to be used as a basis for enhancement at the second hearing. He did nothing following the first sentencing hearing other than to resolve in court a pre-existing factual situation. If enhancement is to take place, it should be due to actions of the defendant. Under the reading of *Pearce* advocated here and adopted by the Second and Ninth Circuits,[9] the "ball is placed in the defendant's lap." If enhancement is to take place, it should be due to actions of the defendant. If he does something new following the first sentencing, he should "pay the price." Otherwise, if there is no identifiable bad conduct of the defendant occurring after the time of the first sentencing, then there is no basis for enhancement.

A second goal of sentencing is rehabilitation. Obviously, if the defendant has committed no new bad act after the first sentence was imposed, the rehabilitation function can be said to have been satisfied.

In enhancing the sentence here, the predominant if not the only goal of the trial court is that of punishment, that is, the intervening plea has given him cause to see

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[9]*United States v. Markus, supra,* and *United States v. Williams, supra,* respectively.

the Petitioner as deserving of more punishment. The Eleventh Circuit was also troubled by the fact that the approach to *Pearce* advocated by the Petitioner, and followed by the Second and Ninth Circuits in *Markus* and *Williams*, respectively, would give the Petitioner the unfair advantage of "having his cake and eating it, too." *United States v. Wasman*, 700 F. 2d at 670. The court noted that where, as here, Wasman specifically requested at the first sentencing hearing that the judge not consider the pending indictment, (J.A. 26), then, at the second sentencing hearing, he should not be able to argue that the resulting conviction not be considered because the facts pre-dated the first hearing. *Id.* The Eleventh Circuit was concerned, as was the trial judge, that the defendant would escape being sentenced with both cases present for consideration by the sentencing judge. However, that fear is unwarranted. Wasman was sentenced with his guilt in both the passport and certificates case considered. Those were precisely the circumstances presented when he was sentenced in the certificates case. At the time of that sentencing, the first passport conviction was pending on appeal. The trial judge in the certificates case specifically acknowledged that conviction and noted that both cases arose from basically the same facts. (App. 39). The judge then went on to sentence Wasman to two years probation. Thus, a United States District Judge imposed a sentence fully aware of both convictions and fully able to consider both in arriving at an appropriate sentence. Perhaps the judge in the instant case did not like the sentence imposed in the certificates case. But to permit the enhancement as occurred here requires a defendant

to run the gauntlet too many times and results in an improper pyramiding of sentences.[10]

In its opinion, the Eleventh Circuit notes that to adopt the *Williams-Markus* approach to *Pearce* would have "two possible consequences, neither likely to be of service to the governing constitutional considerations in *Pearce*." *United States v. Wasman*, 700 F. 2d at 669. According to the Eleventh Circuit, the first consequence would be for a sentencing judge to consider a charge merely pending at the time of the first sentence. Further, if the judge did not consider a pending charge, then the defendant would receive, according to the Court of Appeals, "total immunization of the predating offense from consideration at any time." 700 F. 2d at 669.

However, the Circuit Court overlooks the fact that the predating pending charge will be resolved at some time, as was the certificates case here. If the defendant is subsequently convicted of that charge, as he was here, he will come before a judge for sentencing. When he does, the judge will be able to consider both the case before him and the prior conviction in arriving at an appropriate sentence (as the judge in the false certificates case did here when he considered the first passport conviction. (App. 39)). If the defendant is found not guilty of the predating offense, then clearly that offense should not be considered by another judge in another case as an aggravating circumstance for sentencing. Thus, the defend-

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[10]It is ironic that the sentence was enhanced by eighteen (18) months (six months to two years) based upon a conviction of a misdemeanor for which the maximum allowable sentence was only one year (18 U. S. C. § 480) and for which the Petitioner received a probationary sentence. (App. 39).

ant will not be immunized if a judge does not consider pending charges, even if he will be precluded from considering an ensuing conviction should his case be reversed on appeal and a second sentencing be required.

This Court has said that a trial judge is not constitutionally precluded, in re-sentencing, from considering events subsequent to the first trial that may throw new light upon a defendant. *North Carolina v. Pearce*, 395 U. S. at 723. Though the intervening conviction may shed new light on a defendant, the chilling effect upon the defendant's decision-making as to whether to exercise his appellate rights demands that prior conduct not be considered on re-sentencing. To hold otherwise would result in an improper pyramiding of sentences as well as instill fear of vindictiveness in the defendant.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that the judgment of the Court of Appeals should be reversed and the case remanded to the district court for re-sentencing before a different district judge.

Respectfully submitted,

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December 1983

APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF FLORIDA

No. 78-259-Cr-EBD

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MILTON R. WASMAN,

Defendant.

United States Courthouse
300 Northeast 1st Avenue
Miami, Florida
October 30, 1980

The above-entitled matter came on for hearing before the Honorable EDWARD B. DAVIS, United States District Judge, at the time and place aforesaid, pursuant to Notice.

APPEARANCES:

KEVIN M. MOORE,
Assistant United States Attorney
on behalf of the Government.

SANDS & MOSKOWITZ, by
JAY R. MOSKOWITZ, ESQ.
on behalf of the Defendant.

(p. 2) INDEX

(p. 3) The Clerk: The case of United States of America vs. Milton Wasman.

Counsel, come forward, please.

Mr. Moore: Good afternoon, your Honor. Michael Moore on behalf of the Government.

Mr. Moskowitz: Jay Moskowitz, on behalf of Milton Wasman, who is here.

The Court: Mr. Wasman, the Court is informed that you wish to enter a plea of guilty to the Information filed against you in this case. Is that correct?

Mr. Moskowitz: May I speak, your Honor?

The Court: Yes.

Mr. Moskowitz: As your Honor is well aware, there has been a pending indictment against Mr. Wasman for a couple of years now. You had it for quite some time.

An Information was recently filed by the United States Government as part of negotiations that we had a condition of that Information there was a dismissal of the indictment.

What we would like to do today, your Honor, if your Honor is so inclined, is Mr. Wasman would like to enter a plea of nolo contendre to the (p. 4) Information. Knowing full well when we say that, the Government as a matter of policy must always oppose a nolo plea but the Court can accept it.

I would just like to make a couple of statements, if I may, in that regard.

First off, that this case has been around in one form or another for a long, long time. One reason was that the first year Mr. Wasman was ill. He had a stroke. And that was during the year 1979.

Since I got into the case, and I think since your Honor got into the case back in February of this year, we have had numerous delays due to the complex nature of the case, the numerous out-of-country witnesses, the proposed lengthy trial schedule and trying to accommodate all of those parameters and getting the case together just kept putting it off and putting it off and putting it off.

Within recent weeks, as I have stated before, the Government and Mr. Moore, representing the Government, and I have been involved in some discussions in an attempt to resolve this case, keeping in mind all of the parameters I just mentioned.

It culminated in the filing of that Information I mentioned last week.

Now, Mr. Wasman is sixty-three years (p. 5) old and, in addition to the advancing age and the problem that he has with his health, also has the residual effects of the stroke he suffered last year.

At this particular time, we would like to try the mail fraud case. Mr. Wasman feels he just would like to get this whole thing over with and put it behind him, which is the reason we resolved this in the way we did in the terms of the filing of this Information.

I think that this is a case that would speak for a nolo plea, if the Court would consider one.

The Court: Mr. Moore.

Mr. Moore: For the record, the Government would note its objection to the plea of nolo.

The Court: This charge has been reduced to a misdemeanor, has it not?

Mr. Moskowitz: Yes.

The Court: Then we will start this over a little bit.

Mr. Wasman, I understand that you wish to plead nolo contendre to the Information filed against you in this action. Is that correct?

The Defendant: That is correct, sir.

The Court: Before accepting your nolo contendre plea, there are a number of questions I will (p. 6) ask you to assure that it is a valid plea.

If you do not understand any of the question or at any time wish to consult with your attorney, please say so since it is essential to a valid plea that you understand each question before you answer.

Bruce, would you swear the defendant?

Thereupon—

MILTON R. WASMAN

was called as a witness and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By the Court:

Q. Do you understand that having been sworn, your answers to my questions will be subject to the penalties of perjury for making a false statement if you do not answer truthfully?

A. Yes, sir.

Q. How old are you, Mr. Wasman?

A. Sixty-three.

Q. And you have gone through law school, is that not correct?

A. Yes, sir.

Q. Have you taken any drugs, medicine or pills or had any alcoholic beverage in the last twenty-four hours?

(p. 7) A. I take six or eight little red pills that are called Pernanthan··m [phonetic], something like that. It enables the blood to go easier through the vascular system.

Q. Blood pressure medication or cardiovascular?

A. Yes. It's because of the strokes I have had and trying to prevent it. I think what they are doing is greasing my blood a little bit to put it in layman's language. It has no side effects.

I also take a little blue pill. I take two and a half, whatever it is, millimeters of it for control of diabetes. That has no side effects.

And I take three Ascriptins twice a day. That's for the fascular problem and arthritis.

That's all the medication I take.

And I have not had any alcoholic beverages in weeks or any other drug.

Q. You certainly understand what is happening here today?

A. Yes, sir.

The Court: Mr. Moore, do you have any doubt as to the defendant's competence to plead?

Mr. Moore: No, your Honor, none at all.

(p. 8) The Court: I am sure, Counsel, you don't have any doubt.

Mr. Moskowitz: No, your Honor.

By the Court:

Q. Mr. Wasman, have you had an ample opportunity to discuss this case with your attorney?

A. Yes. On more than one occasion.

Q. Are you satisfied with his representation?

A. Absolutely.

Q. Have you received a copy of the Information charging you?

A. No, sir. But I have been over it thoroughly with Mr. Moskowitz and I don't need to have one in my possession.

Q. You are thoroughly familiar with the charge?

A. Yes. If I got it, I would just go down and discuss it with him anyhow.

I do not feel that's important.

Q. You have discussed the charges in that Information which you intend to plead nolo?

A. Yes, totally.

Q. Do you understand that the maximum (p. 9) possible penalty under Count 1 in the Information is one year imprisonment plus a fine of $1,000?

A. Yes, sir.

Q. You understand also that under the Constitution and laws of the United States you are entitled to a trial by jury on the charges contained in the Information?

A. Yes, sir, I do.

Q. And you understand that at that trial you would be presumed to be innocent and the Government would be required to prove you guilty by competent evidence and beyond a reasonable doubt before you could be found guilty; you would not have to prove that you were innocent?

A. Yes, sir, I do.

Q. Do you understand also that at trial while you would have the right to testify if you chose to do so, you would also have the right not to testify and no inference or suggestion of guilt could be drawn from the fact that you did not testify?

A. Yes, sir.

Q. If you plead guilty and I accept your plea, do you understand that you will waive your right to a trial and the other rights I have just discussed; (p. 10) there will be no trial and I will enter a judgment of guilty and sentence you on the basis of your nolo plea after considering a pre-sentence report?

A. Yes, sir, I do.

Q. Do you also understand that you will have to waive your right — that you may have to waive your right not to incriminate yourself since I may ask you questions what you did in order to satisfy myself that you are

guilty as charged and that you will have to acknowledge that guilt in the questions that I ask?

A. Yes, sir.

Q. Having discussed your rights with you, do you still wish to plead nolo contendre?

A. Yes, sir, I do.

The Court: Mr. Moore, what in summary would the Government's evidence be in this case?

Mr. Moore: Your Honor, the evidence at trial would show, your Honor, that in the early 1970's the defendant, Milton Wasman, sought investment capital for the purpose of developing a parcel of real estate in Central Florida.

The defendent's principal source of investment funds was raised through a prospectus promoted primarily to foreign investors which prospectus, (p. 11) your Honor, we have available for the Court's inspection as Government's Exhibit 1-A, which is in a foreign language, and Government's Exhibit 1-B, which is translated in the English language.

The principal feature of the prospectus offered an approximate fifteen percent return on the investment which would be secured by real estate and certificates of deposit.

The subsequent investigation disclosed that the certificates of deposit were not genuine but were, in fact, counterfeit as having been issued on a non-existent foreign bank.

Your Honor, we have a copy of the certificate of deposit for the Court's inspection as Government's Exhibit No. 2.

The testimony of the witnesses as disclosed, among other things, that the defendant instructed his secretary to forward the counterfeit foreign certificates of deposit to Lawyers Title Guaranty Company after instructing his secretary to sign the name John McCallum, a non-existent person, to a cover letter which enclosed the counterfeit foreign securities, and that is contained in Government's Exhibit No. 2.

It was later determined that the certi (p. 12) ficates of deposit to secure the prospectus were in fact issued on a non-existent foreign bank, and we have established that in Government's Exhibit 3-A, which is from the Republic of Panama certifying the non-existence of the foreign bank, and in 3-B, which is the translation of Government's Exhibit 3-A.

The principal acts of the defendant took place during a period and date of October 31, 1973, and took place principally in the Southern District of Florida.

Substantially, your Honor, that would be the government's evidence.

The Court: Mr. Moskowitz, do you disagree with anything you have heard?

Mr. Moskowitz: Not really in terms of what Mr. Moore has said.

I would just like to make one observation, as I started to mention before, your Honor, at the beginning when I told you what we were here for.

As I said, this case has been around a long time and that is why we are here with this negotiated plea.

Offering a plea of nolo and in conjunction with what Mr. Moore just said, I mentioned the (p. 13) case of North Carolina vs. Alferd which just talks basically about a plea not admitting the offense but saying, "It's in my best interest to enter the plea," and the combination of the two, the nolo plea and North Carolina vs. Alferd, I have no further comments.

By the Court:

Q. Mr. Wasman, has anyone threatened you or anyone else or forced you in any way to plead nolo contendre?

A. No, sir.

Q. Do we have a written plea agreement entered into between you, your counsel and counsel for the Government?

Mr. Moskowitz: We have not formally entered into a written agreement, your Honor. We have exchanged some letters which sets forth to some degree.

The agreement we have basically is that in return for Mr. Wasman's plea for the Information which was just filed the mail fraud indictment will be dismissed and, secondly, at the time of sentencing, the Government will make no recommendation as to sentence.

There are a couple of collateral matters (p. 14) which does not really go to the heart of the plea agreement.

One, Mr. Wasman has another case that is now pending before the Fifth Circuit which may very well be re-

manded for a new trial, and we have a collateral matter about the use of anything that occurs here at that subsequent trial.

But that is not really conditioned upon this plea.

The Court: Mr. Moore, do you agree with that statement?

Mr. Moore: Yes, your Honor, I think that is substantially accurate.

By the Court:

Q. Mr. Wasman, has anybody made any promise to you other than that which has just been represented by counsel that induced you to plead nolo?

A. No, sir.

Q. Do you understand that the Court is not required to accept your nolo plea or the agreement that you have entered into and I may reject is; do you understand that?

A. Yes, sir, I am aware of that.

Q. If I do reject it, you will be advised (p. 15) in open court and you will have an opportunity to withdraw your nolo contendre plea.

However, if you continue to persist in your plea after the agreement is rejected, your sentence or your disposition of your sentence may be less favorable to you than has been proposed here.

Do you understand that?

A. Yes, sir.

Q. Has anyone made any prediction or promise to you as to what your sentence will be?

A. No, sir.

Q. Mr. Wasman, Count 1 of the Information charges that on or about October 31, 1973, at Dade County, in the Southern District of Florida, you knowingly and intentionally possessed and caused to be delivered false certificates of deposit purported to be issued by a bank in Panama, a foreign country, in violation of Title 18, United States Code, Section 480.

How do you plead to Count 1 of the Information?

A. Well, sir, I received those from the so-called brokers and I deivered them in accordance with the instructions given me.

Would you repeat the question, sir?

(p. 16) Q. How do you plead to the charge in Count 1 of the Information I just read to you?

A. Not knowing the procedures correctly, I apologize for going off into the wrong direction.

I plead nolo contendre.

The Court: The Court finds that you, Milton Wasman, are now alert and intelligent, that you understand the nature of the charge against you, appreciate the consequences of pleading nolo contendre, fully understand your rights and possible penalty.

The Court also finds that the evidence which the Government is prepared to present contains all the elements of the crime.

Furthermore, the Court finds that your decision to plead nolo contendre is freely, voluntarily and intelli-

gently made, that it is not the result of force or threats or promises apart from the plea agreement that has been discussed in open court and that you have had the advice of counsel of a competent lawyer with whom you say you are satisfied.

Your plea of nolo contendre is accepted by the Court and the Court finds that the defendant, Milton Wasman, guilty of the offenses charged in the Information. The defendant is hereby adjudged guilty.

(p. 17) The Probation Office is directed to conduct a pre-sentence investigation of the defendant and submit the same to the Court.

By the Court:

Q. I presume you are out on bond at this time; is that correct?

A. Yes.

Mr. Moskowitz: I think it is a personal surety bond.

The Court: There is no objection to continuing that bond at this time—

Mr. Moore: No, your Honor.

The Court: — under the current terms and conditions?

I am going to continue that bond and I am going to turn you over to the Probation Officer to prepare the beginning of the PSI.

Court is adjourned.

Mr. Moskowitz: One further thing, your Honor.

One of the conditions of the plea was the dismissal of the mail fraud indictment.

I spoke to Mr. Moore before we began here, and he would have the proper papers tomorrow.

(p. 18) Mr. Moore: Your Honor, it is our intention to dismiss the outstanding indictment and we will do that forthwith.

The Court: Fine, Mr. Moore.

[Thereupon the hearing was concluded at 3:35 p.m.]

(p. 19) CERTIFICATE

State of Florida, County of Dade, ss.

I, LARRY HERR, Official Court Reporter, do hereby certify that the foregoing transcript, pages 1 through 18, is a true and correct transcription of my stenographic notes of the proceedings before the Honorable EDWARD B. DAVIS, United States District Judge, at the time and place hereinabove set forth.

DATED at Miami, Dade County, Florida, this 28th day of April 1981.

/s/ Larry Herr

(p. 1) IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA

No. 78-259-Cr-EBD

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MILTON R. WASMAN,

Defendant.

United States Courthouse
300 Northeast 1st Avenue
Miami, Florida
January 21, 1981

The above-entitled matter came on for hearing before the Honorable EDWARD B. DAVIS, United States District Judge, at the time and place aforesaid, pursuant to Notice.

APPEARANCES:

KEVEN M. MOORE,
Assistant United States Attorney,
on behalf of the Government.

SANDS & MOSKOWITZ, by
JAY R. MOSKOWITZ, ESQ.,
on behalf of the Defendant.

(p. 2) The Clerk: The case of the United States of America vs. Milton Wasman.

Counsel come forward and state their appearance, please.

Mr. Moskowitz: Jay Moskowitz on behalf of the Defendant Mr. Wasman.

Mr. Moore: Michael Moore on behalf of the Government, your Honor.

The Court: Mr. Moskowitz, do you know of any reason why sentence should not be imposed at this time?

Mr. Moskowitz: None, your Honor.

The Court: Mr. Wasman, do you know of any reason?

The Defendant: No.

The Court: Do you have anything you want to say on behalf of your client?

Mr. Moskowitz: Yes, I have something to say. Mr. Wasman would like to address the Court personally. Mrs. Wasman is also in the courtroom and she would like to make a couple of statements to your Honor.

First off in just a bit of recap. If your Honor recalls back in October we entered this plea of nolo contendere to a one count misdemeanor of possessing false certificates of deposit in return for (p. 3) which the Government dismissed a four count mail fraud indictment.

At the time we announced we were doing so, Mr. Wasman was doing so not so much because of his guilt but because it was time to get these matters behind him

and that we would be submitting some information to the Court through the PSI explaining some of the situation in this matter.

We did submit a short summary with a lengthy supporting document as to much of the charges in the underlying mail fraud offense and also the offense now before the Court.

We would be happy to answer any questions the Court might have as to what is contained in those pages. They were quite lengthy, the total package, and I would not just want to waste the Court's time going over it in detail unless the Court has some specific questions about it.

Mr. Wasman would like to address the Court in some brief fashion about the situation. But unless the Court desires, we don't plan on reiterating in the PSI.

The Court: Yes, I looked that over and I went over the PSI carefully. I know in the prior case I think with Judge Rutger. In that case Judge (p. 4) Rutger sentenced Mr. Wasman I believe maybe under the split sentence provision. He sentenced him to six months confinement under the other case.

The Defendant: Yes, plus a period of probation. Which case is now presently on appeal.

The Court: I am aware of that.

Mr. Moskowitz: What I would like now if your Honor concurs is to have Mr. Wasman say a few words.

The Court: Surely.

The Defendant: Your Honor, I have been admonished by Mr. Moskowitz to make this brief and it is very

difficult to tell you the whole story about these things in short form.

However, let me start at a point which may be in addition to the PSI information. There is no sense in going over that.

I met the two people who were involved in the Traders Cove and LADCO transactions, Messrs. Phillips and Comminos some time in '70, '71 or '72. The dates escape me. They were in desperate need of some business. I didn't know this at the time and not until very recently they had been IOS and RAMCO under Mr. Vesco and that other group and had been wiped out of that when that went sour. And they got involved in (p. 5) some transaction in the selling of land, bona fide land in Freeport.

But that became worthless when Mr. Pindling took charge. Nobody was willing to buy nor could they do anything and it looked like all the investors were in deep trouble because they were either going to have to become natives or something difficult was going to happen.

So they were kind of frantic to get into something.

I knew a lady who was a broker there and who knew these two gentlemen because they were business associates.

So they came to me and they asked me if they could finance our Traders Cove Mobile Home Park. We became involved. They were constantly anxious to do more business. And my only desire was to complete Traders Cove Park.

If we borrowed the money on the plan, which was extremely expensive, it was only agreed to because they

also consented and promised to sell substantial other lots that we had for cash.

The other sales that we had made on the land adjacent to this area had been on installments over ten-year periods. So the cash transaction would (p. 6) have been substantial. The price was somewhere in the $3,000 range and we had two or 300 lots. So if we could sell those and get the cash we would be in a good cash position to go forward with other projects.

It was intended to just handle 150 or 200, 250 lots on the financing and complete it.

When I went in to stop that because we didn't need to do it any further they came up with all kinds of propositions.

Among them was the transaction involving buying of accounts receivable from a company on the Beach. I will point that out to you later.

And the other was to please help them do something and they would use the certificates which were furnished to me.

At first I was assured that everything was fine. Later when some problems came up I became aware of the fact there could be difficulties with them and later learned that there were difficulties with them.

What we did was to take the money, and this was my purpose, intent and job, and it arose because I had purchased a piece of land during the time we were working on the mobile home park and had sold it for a substantial profit in the company.

(p. 7) And they became very anxious to do that. And the market was extremely good. It was the appropriate time.

So they suggested and we arranged to take monies that they could arrange for in this fashion and put it into land, and we did. We bought 640 acres in Ocala, paid $460,000 for it and could easily have sold it for a million. But the broker told me it was worth a million eight and so I discussed it with these people and they said let's wait.

I bought a half interest with Robert Miller in another farm and we paid twenty-five hundred an acre. We sold forty acres for forty-five hundred an acre, the least desirable piece. And they wanted to wait a little longer, which was agreeable to me because there were no payments due on anything yet.

Then they wanted to go into other things. By that time we had 116 lots free and clear and the adjacent properties. We had developed a quarter of a million dollar recreation building for Traders Cove, we had a water plant and a sewer plant.

We had rather substantial property values. At that time I had already been working like fifteen, sixteen hours, eighteen hours a day running back and forth trying to practice law, going up to (p. 8) Ocala, going up to Sanford, Deland and the pressure of it had caused me to have a stroke. So that shortly after that while the effects were still quite serious I decided that I could not continue the pressure.

That's when things began to get kind of rough and nasty between us when I wanted to stop. They exerted

such pressure on me and my wife that eventually we sat down in October of '74 and Mildred had suggested to me there is nothing worth it. I had been to Europe and endeavored to turn the matter over to a trustee, a financial institution so that he could contact local people and have better rapport with the investors and carry on.

But they investigated the brokerage situation and felt that it had been so much overreaching that they just didn't want to become involved. And I couldn't get anybody over there to take it.

So when I told these people that I would not go any further we got together and I turned over to them all of these properties and I did that so that I would be able to be free of this constant pressure of working, go back to practicing law and live like a human being so that my wife would have a husband again.

It was her desire as much as mine. But it didn't work out that way. Everything I gave them, (p. 9) and I know this from the litigation that has ensued, they gave away the farm that was worth more than a million dollars and then it was foreclosed because the man they gave it to took all the timber off of it and sold all the hay off of it for two years and then didn't pay an installment on the underlying mortgage for the entire time, didn't pay the taxes for the entire time and of course it was gone together with the forty acres of it they had improperly sold to some people.

And on the other piece they did the same thing. They frittered it away.

On the mobile home park lots which were deeded over to them they transferred them to somebody else for

no consideration and gave no money to any of these investors.

All of this occurred, your Honor, after I had given it to them when they were in a position to have liquidated it. And even at a discount they would have been able to get enough money to pay everybody off in full and made some money.

So I'm here after having done my very level best to accomplish what was set out to accomplish and make a profit for everybody and to see to it that everybody got paid back. And it was not done not through any negligence or fault on my part.

(p. 10) The Court: I look at that, Mr. Wasman. I guess the European investors did they get anything back for the half million or so dollars?

The Defendant: Your Honor, they were transferred $3,000,000 worth of properties which could have been sold at that time for that money. The figures that I give you are the figures that they could have been sold for.

And they would have been paid out in full. Plus there would have been a profit for everybody else. And I have a list of what the numbers that we put in that PSI. We gave them 116 fully improved lots with water, paving, sewer, electricity and telephone connections.

Each lot worth $6500. We gave them 1244 surveyed and engineered lots valued at approximately $750 each not improved. We gave them a water plant and the lines installed in the first unit.

We gave them a capacity of 500 units of water systems. We gave them a sewer plant with a capacity of 350

units completely installed in the unit. We gave them a recreation building that cost $230,000. We gave them mobile homes that were installed and placed in the park valued at more than $42,000.,

We gave them an office mobile home. (p. 11) These are all double wide, your Honor, which cost us $16,000. We had maintenance equipment such as a small bull-dozer, a backhoe, and so forth, which cost us $45,000.

We had proceeds on deposit in a Swiss bank account of $12,000. We had proceeds on deposit in a Willow Run bank of $3500. We had proceeds in escrow with the Volusia County Road Department which they released in the amount of $10,000.

We had proceeds on deposit in the Miami bank account in excess of $9,000. On the farm in Ocala, the Willow Run farm, they had equipment up there valued at $35,000. They had the farm was valued at a million but worth more.

We had $485,000 mortgages on it which left us with an equity of $515,000. That farm, Your Honor, consisted of three houses and four or five barns, a little race track, machinery equipment, everything.

There was another farm which we had a half interest. The cash investment was $100,000 which consisted of equity. And then the property from the sale of forty acres was $36,000. And the income from that sale was all applied back into the reduction of the mortgage.

There was 360 acres of that left valued (p. 12) at $4,000. And we have an offer, and I think Mr. Moskowitz

has it in his file if it's not in the PSI, in which we were offered $4,000 on April 4th at that time.

If you total that up it comes to $3,264,000. The total amount required to liquidate the obligations of these people, all of which was assigned to them, was a total of $530,000. So they had five or six times as much money available.

Now, what happened was they transferred the Willow Run farm with the $515,000 equity to a man for a note. He never paid him a dime on it. And he then tore the timber off of it and sold it. Took the hay off of it and then sold it. He sold the equipment to the next door neighbor. And not a penny of it went to these people or to the people who got it as trustees for these investors.

The same thing happened all the way down the line. They do not have one piece of land or anything that they retained which they could have and should have for the purpose of paying this off. I had no control of that after I turned it over to them.

I am going to wind up with this brief reference. There is a case, your Honor, in the Circuit Court of Dade County entitled Carl Reber, et al. vs. (p. 13) Robert Little, et al. Robert Little was in and out from time to time a partner with Messrs. Phillips and Comminos.

The Court: Is he dead now?

The Defendant: Yes, sir, he died of cancer.

The Court: I think I have him in another case, Mr. Little.

The Defendant: I am surprised it's only one.

The Court: There are many cases in this court. I certainly don't have them all.

The Defendant: They got together to talk about what I had turned down for them. A company on the Beach, I think Equitable Development Company, was offering some accounts receivable, contracts on land that they had sold for sale at a discount.

I negotiated with them at forty percent, which would have meant a pretty good profit. These gentlemen said that they could sell them in Europe for about fifty or sixty and pick up a profit. I investigated it. I even put up $100,000 of these monies to buy it subject to investigation.

I found out that the insurance company that was supposed to insure the accounts had not (p. 14) committed to insure them and would not. I found that the accounts were not current. I found the real estate monies which were supposed to be escrowed were not.

Anyhow, I turned it down in the early part of '74. Now, the Reber case reflects that when I turned it down and it couldn't be done they got together, Little, Phillips and Comminos, and they sold a package of three million eight hundred some thousand dollars to the Europeans, all consisting of manufactured accounts receivable and documents, attorney's opinion, bank references, approval from the State officials. Everything was manufactured.

What happened in that case was that Phillips joined with one of the investors. And there were a slew of them for that kind of money in suing Robert Little, his partner.

And later after the heat died down the case was dismissed for lack of prosecution because Phillips did not pursue it and at about the same time they formed the International Gold Company and went into business together again and then they were stopped by the Department of Business Regulations of the State of Florida.

So that what he did in that case was instituted a suit to get the heat off of himself. Then (p. 15) as soon as the heat got off they went into something else.

The Court: Mr. Wasman, you are a smart man. I look at you practice law in this area for a long time.

The Defendant: Forty years.

The Court: I got a little note from Mr. Sakowitz that says how competent you are. You are paying forty percent for first share of financing. Accepting your story you are picking the worst people you could find.

The Defendant: I didn't know at the time. They represented they were elite. I didn't know that. If you would meet them you would think they were pretty decent people.

If you are talking about the forty percent, your Honor, the explanation for that, the reason for it aside from stupidity is the fact that they committed to sell other land for us for cash which would have been a big benefit as against selling those same lands on a basis of a fifty percent commission to a local land selling organization on a ten-year plan.

Now, the difference was substantial. In the first place on the sale of the lands that they contracted to sell for us or committed in exchange for (p. 16) this high

price there was no commission. They were going to pay us our full price and they were going to resell them and we transferred these to them and they resold them.

So that we were coming out ahead and the difference of the cost of the financing in one instance was more than made up by the other transaction.

The Court: I understand what you are saying.

The Defendant: That's the only reason I could afford to entertain such a proposition. But I must say this to you, your Honor. I didn't get nor did any member of my family get a dime out of this thing. Everything I have said to you or shown you in that statement as having given up was ours before.

Long before I ever heard of these characters. We bought that property in 1956 with the exception of those two pieces. We developed it, we sold some off. We did a lot of things with it. It was bought with money from my mother's estate and some of the investment was made by my wife from her father's estate.

But not one penny when we should have received payment in exchange for lands that were turned over to them we didn't. My wife gave releases with no (p. 17) consideration because every time I looked forward to the day we got the place competed because of the projection I made on the first 250 mobile home sites showed a profit of $800,000, which would have paid off all the expenses that we incurred plus left us money to proceed.

So I wasn't really worried about paying anything off then. I was going to see to it that they got paid off in the future.

I stand here and I must tell you that the most horrendous part of all this is what I have done to my wife. I just can't tell you how I feel about that. I mean, she has just been through too much and it's my fault.

The Court: Mr. Moskowitz.

Mr. Moskowitz: I think Mrs. Wasman would like to say a couple of words to your Honor, also.

Mrs. Wasman: Your Honor, I wasn't sure what I was going to say but you said something in talking to my husband that gave me an opening.

You remarked the high opinion people have of him as an attorney, he is a smart man. He is all of that. He is a wonderful attorney, he is a wonderful man. He is a warm, compassionate, intelligent man who has one fault.

(p. 18) He never learned what was best for himself. His concern has always been trying to do what other people ask of him rather than what was best for himself, and I must confess what was best for me because he considered me a part of himself and he felt he could always take care of me, and he has.

We didn't get anything out of this. I had some nice trips. I made what I thought was good friends, Mr. and Mrs. Phillips, Mr. and Mrs. Comminos were very good.

Mr. Phillips was in my house for a week of almost every month of the year for about two years. He was a member of my family. But as far as money, any money that may have passed through my husband's hands went right back into where he thought it was important that it go.

We have lived in the same house for forty years. At the age of sixty I had to go back into the working world. That's where I am now. I had complete faith in his judgment and his ability to provide for us.

It's now become my responsibility. We live on pretty much of what I make. I very much wanted him and it was I who said I want to turn this over to them because I saw my husband get a stroke. I knew it (p. 19) was from pressure.

I have already invested at least ten or twelve years of my life and I wanted no more of it. I felt sure that if we were free of it and these people were paid off that he would be able to provide for us.

At the time the pressure got so heavy on him I had the feeling that people who had been my friend had become like scavengers. I felt as though they were trying to eat the flesh off my bones. I had Mr. Gothel and Mr. Phillips pounding on my front door one day.

Not just one day but a couple of times because they were looking for Milton and they were sure that he was hiding someplace because they were trying to pressure him into doing just what we did. We have paid a terrible, terrible price for what I consider were criminal activities of other people.

We are paying for being fools. And we are paying, our children are paying and I hope to God our grandchildren don't pay in humiliation and in knowledge this man they think is the personification of everything wonderful is not.

If you will excuse me I would like to leave now.

The Court: Certainly.

(p. 20) Mr. Moskowitz: A couple of words I would like to say, Your Honor, and then we are finished.

There is nothing more that I can say about this particular case. We did have the opportunity to read over the pre-sentence investigation report and there are a couple of things that I would like to comment upon very, very briefly.

First is as the Court is aware in the pre-sentence report there were a couple of previous matters involving Mr. Wasman. One was an income tax matter back some seven or eight years ago, which was a matter involving failure to file a tax return for one particular year.

It was back I think in '72 or '73. That tax was paid after that. It was a failure to file misdemeanor charge. The other case involved a case that was before Judge Rutger involving obtaining a passport, using a false name. That's the case that is presently on appeal.

That case from my review of some of the documents in some of the submissions to the probation office then also involved the same cast of characters as this one. And particularly Mr. Comminos.

As I said, the case is on appeal now. It was argued before the Fifth Circuit in the early (p. 21) part of November and I expect there will be an opinion in that case rather soon.

Mr. Gale, who was Mr. Wasman's attorney in that appeal, is in the courtroom today. I have talked to him. He mentioned you never know what is going to happen. But the Fifth Circuit was not overly impressed with the case itself in terms of the magnitude of it from what was told to me.

What they are going to do with it on the legal points I really don't know. In my view it could be a very interesting case. It's been a long time and I expect a lengthy opinion shortly.

As Mr. Wasman pointed out there is not much—as Your Honor also pointed out in the statement of Mr. Sakowitz there isn't much else in the PSI that I would like to stand up here and dispute aside from those points we have already covered.

In essence the PSI was really a glowing report of Mr. Wasman in terms of his role as a family man, as an attorney in this town and as a person. The PSI I felt was very favorable to him in all of those aspects.

I would just like to conclude by saying in summary taking into account all of the facts and circumstances of the case and of the associated matters (p. 22) I feel a just and fair sentence in this matter would be some period of probation.

The Court: Mr. Moore.

Mr. Moore: Your Honor, as part of the agreement the Government stated it would not make any specific recommendation but would reserve the right to advise the Court fully of the facts and circumstances.

And there have been certain statements that have been made by Mr. Wasman to the Court today that I would not want to be left unanswered.

There in essence are two versions of the facts of this case. Mr. Wasman has provided the Court with an innocent version that he was somehow used or duped by these other individuals.

First of all, Your Honor, I don't want to address the specific facts to suggest that Mr. Wasman has used to suggest his innocence but would reurge the facts as presented in the pre-sentence investigation and ask this Court to in the final analysis if it must choose between an innocent version or a guilty version of a set of facts that Mr. Wasman is here today because of his plea, albeit nolo contendere, to what in effect amounts to a guilty version or set of facts.

It's one thing if an individual appears (p. 23) before the Court one time and asks the Court to indulge in any questions as to the intent of guilt or innocence. It's another thing if a man appears before the Court a second time and asks the Court to believe him when he tells you that he is innocent.

Your Honor, we are at the point now where the third time around we are stretching our ability to reasonably believe an explanation that I would suggest that we are simply not entitled to indulge in being here the third time.

Mr. Wasman has provided a number of explanations of what was given back to these investors. I might point out first of all that to the best of my knowledge and belief, Your Honor, and I may be corrected on this, but to the best of my knowledge and belief anything that was given back was in actuality taken back following litigation or as a result of a settlement in litigation.

There was nothing gratuitous on anyone's part.

Secondly, to the extent anything was given back it was given back in connection with an entirely different investment scheme, if that's what we can call it, in con-

nection with Traders Cover. Land in Volusia County. Nothing has been done for the (p. 24) investors who purchased the land in Marion County in connection with the LADCO scheme which gave rise to the information of the possession of the forged, counterfeit CD's in this case.

Your Honor, much has been said about the other participants. Mr. Wasman has contrasted himself with other individuals who he believed were businessmen that turned out to be crooked themselves.

If we are going to interpret this in a guilty version or an innocent version of a set of facts, we might simply refer to the phrase that these were really birds of a feather and that Mr. Wasman was simply one of those birds.

We suggest, Your Honor, his position as attorney in Miami that he was one of the central figures in this scheme.

Lastly, Your Honor, we disagree with any suggestion as to the merits of the case in front of the Fifth Circuit. While we recognize that there is a good litigable issue on appeal, we don't really think it should have any bearing on this Court's sentence today for the offense for which this Court must sentence Mr. Wasman.

Thank you, Your Honor.

Mr. Moskowitz: Your Honor, may I make (p. 25) just a couple of quick observations on what Mr. Moore said?

The Court: Surely.

Mr. Moskowitz: First off, Mr. Moore is correct, Your Honor, we are standing here on a plea of nolo contendere. We are not here standing here on a Bench trial to decide

guilt or innocence. But we are also standing here on a plea of nolo contendere to the possession of certain certificates of deposit.

Now, the mail fraud case by the nature of the whole proceedings is tied up in that. That's why as I announced at the change of plea we felt it was imperative to put before the Court Mr. Wasman's comments concerning that. We are not here standing asking the Court to say Mr. Wasman is guilty or not guilty. That's been already adjudicated.

But the only reason for Mr. Wasman's statement to the probation officer, which Your Honor has, is to lay out his version of the mail fraud charge. Which again is somehow tied up in the possession of the certificates.

As to Mr. Moore's comment that the transfer of those properties were really a taking back by the people of their properties, there was to the best of my knowledge no litigation that prompted that (p. 26) agreement which transferred those properties back in the early part of 1975.

In the agreement, which is one of the exhibits that were submitted to Your Honor, it specifically mentions upon the sale of certain of those assets after a small payment per lot to the Wasman family the bulk of the assets will be used to liquidate the investments of the LADCO people. Which were the people involved, the LADCO project was the people involved.

The Court: In the five hundred thirty thousand?

Mr. Moskowitz: Yes, Your Honor, I don't have it before me. It is one of the exhibits in the documents. It's Exhibit J. Which on Page 2 of the exhibit talks of the

proceeds from the sale of a particular parcel going to the creditors American Land Development Company.

Also on Page 3 a couple of points. So the land that was transferred back or transferred over to the control of Messrs. Phillips and Comminos was the sale of that land where the proceeds were to be used to pay back the LADCO investors.

The last thing I wanted to say, as I commented and as Mr. Moore also commented, this is not (p. 27) Mr. Wasman's first time before a Court awaiting sentence. But as I said the passport case is tied up. The appeal in that case is tied up in the presentation.

One of the issues is tied up in the presentation of defense Mr. Wasman offered at that trial involving a kidnapping plot involving Mr. Comminos. The facts in that case are tied to the facts in this case.

The Court: I realize that. That is correct too, Mr. Moore?

Mr. Moore: It is I would say intimately interwoven.

Mr. Moskowitz: And also as far as the tax case is concerned, Your Honor. That was back in 1973. It was a one count misdemeanor information involving failure to file a tax return for one particular year. I don't think that the overall tax was that great. It was paid. Mr. Wasman received a period of probation I think it was.

I don't know what it was. But he served his probation successfully. There was not any indication of fraud in that case. It was a simple one year. Mr. Wasman did not file his tax return, as the PSI indicates. I don't say this as an excuse. As the report indicates, Mr. Wasman

was an attorney in town (p. 28) and just one year he let it slide for not having the time to file it or whatever.

I am not making it as an excuse. We are not talking about a hardened criminal up here before the Court for a third fall. We are talking about first off this case being connected with the passport case and the other case, the tax case, being a deminimus type of misdemeanor violation.

The Court: Doesn't it surprise, Mr. Moskowitz, as bright as Mr. Wasman is that these things have happened to him? And particularly this case.

Over a long period of time, too, that he has had difficulty here.

Mr. Moskowitz: Particularly this case, Your Honor, we are talking about from what I know. I have never met Mr. Phillips and Mr. Comminos is no longer with us. From what I understand these are people who from what I have been told can be quite impressive.

I don't think as the documents that I put forth in the package that we submitted indicate there was ever any intent on Mr. Wasman's part to attempt to hurt anyone.

One of the exhibits that I attached was a payout sheet, I believe a payout sheet. Something I (p. 29) got from the Government on discovery in this case of payments to the investors. Up to the point where Mr. Wasman prior to Mr. Wasman's resignation and prior to the time that he turned the land over to the Phillips, Comminos interest the payout sheet indicates that no investors—if I read it correctly—ever missed a payment for his interest.

The Court: That is the funds that came in from other investors and gave it back, is that not correct, Mr. Wasman?

The Defendant: Some of it came from the sale of another piece of land, Your Honor. The amount was relatively small. Those were interest payments. We made on one transaction $97,000, which would easily have covered all of the interest payments for two years.

Mr. Moskowitz: What I meant to suggest by that comment, Your Honor, during the time Mr. Wasman was involved with the LADCO project nobody got hurt in terms of being out of pocket on that particular occasion. All interest payments eventually did stop. They were all made during the period of time Mr. Wasman was involved with the LADCO project.

Again, we don't stand here asking the Court to decide which version of the facts to believe. We just felt we should present our version of the (p. 30) "mail fraud" case because it is, as everyone I'm sure agrees, is intimately tied in, the background of it is intimately tied in with this particular case before the Court now.

The Court: Mr. Wasman, you are sixty-three now, aren't you?

The Defendant: Yes, sir.

The Court: I remember when you were sick with the problems before. That is sort of by the boards now.

The Defendant: I feel considerably better. I have done a lot towards getting rid of some of the pressure. When I finally be disposed of the last of them I guess I will feel even better.

The Court: Anything further, Mr. Moskowitz?

Mr. Moskowitz: No, Your Honor.

The Court: Mr. Moore?

Mr. Moore: No, Your Honor.

The Court: I think I am going to be lenient with you really because I realize you have been through a lot and you do have the other sentence facing you from Judge Rutger on essentially the same.

As Mr. Moore indicated, the same sort of facts intertwined.

(p. 31) It is adjudged that the imposition of sentence of confinement is withheld and the defendant is placed on probation for a period of two years.

Court is adjourned.

[The hearing was concluded.]

(p. 32) CERTIFICATE

State of Florida, County of Dade, ss.

I, LARRY HERR, Official Court Reporter, do hereby certify that the foregoing transcript, pages 1 through 31, is a true and correct transcription of my stenographic notes of the proceedings before the Honorable EDWARD B. DAVIS, United States District Judge, at the time and place hereinabove set forth.

DATED at Miami, Dade County, Florida, this 14th day of October 1981.

/s/ Larry Herr

No. 83-173

In the Supreme Court of the United States

OCTOBER TERM, 1983

MILTON R. WASMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the district court's imposition of a higher sentence at petitioner's retrial, to take into account a conviction subsequent to the first trial, violated the Due Process Clause.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals affirming petitioner's conviction and sentence on retrial (Pet. App. A1-A32) is reported at 700 F.2d 663. The opinion of the court of appeals reversing petitioner's initial conviction is reported at 641 F.2d 326.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 1983, and a petition for rehearing was denied on June 2, 1983 (Pet. App. A68-A69). The petition for a writ of certiorari was filed on August 1, 1983, and was granted on October 31, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of knowingly and willfully making a false statement in a passport application, in violation of 18 U.S.C. 1542. He was sentenced to two years' imprisonment, all but six months of which was suspended, and to three years' probation commencing upon discharge from incarceration. J.A. 2-3. The conviction was reversed on appeal on grounds not relevant to the issue now before the Court. 641 F.2d 326 (5th Cir. 1981). Thereafter, petitioner was convicted at a second jury trial. He was sentenced to two years' imprisonment. J.A. 4-5. The court of appeals affirmed (Pet. App. A1-A32).

1. The evidence adduced at the second trial showed that on March 1, 1978, petitioner applied for a United States passport in the name of David Hibbert Hendrick, Jr. Petitioner told the passport examiner that he had forgotten his wallet and therefore had no identification, but that his secretary would swear out an affidavit identifying him as Hendrick. Petitioner then filled out a passport application in the name of "Hendrick." In addition to the false name, he gave a fictitious date of birth, place of birth, next of kin, mother, and father. Petitioner also reported that he had never been married and that he had never previously been issued a passport, although in fact he was married and possessed a current passport in the name of "Wasman." Petitioner signed the passport application and swore that the statements he had made therein were true and correct to the best of his knowledge. He also informed the passport examiner that he intended to travel abroad within the next few days and that therefore he needed the passport as soon as possible. The passport was issued, and

petitioner's secretary picked it up the next day. Tr. 76-88, 93-96; GXs 1, 2, 6.

In order to rebut petitioner's defense that he had legally assumed the name "Hendrick," the government introduced evidence showing that, after posing as Hendrick to obtain the passport, petitioner continued to use the name "Wasman" for other purposes. For instance, on the same day that he applied for the passport, petitioner also applied for a renewal of his driver's license in the name of "Wasman." He applied for a duplicate copy of the license approximately three months later, again using the name "Wasman." Tr. 128-130; GXs 20-22.

In defense, petitioner testified that he needed a passport in a non-Semitic name in order to sell Florida real estate to a group of Arab investors (Tr. 228-232, 240-241, 268).

2. At the sentencing hearing following petitioner's conviction at the first trial, the government advised the district court (Roettger, J.) that petitioner had one prior conviction for failure to file a tax return and also was under indictment on four counts charging mail fraud (J.A. 22-23). The court stated, in accord with defense counsel's request, that it would not consider the unresolved mail fraud charges in passing sentence.[1] The court explained (J.A. 26):

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[1] Defense counsel stated (J.A. 25-26):

> Second point I'd like to respond or rebut is that the suggestion on the part of the prosecuting attorney that [petitioner] is involved or has been involved in a large scheme involving fraud. The Government has brought an Indictment to that effect more than a year ago in this Court.
>
> * * * * *
>
> * * * I am simply making the point that the Government attempts to paint with a broad black brush here and sug-

> I don't consider pending cases in determining sentence because my theory of sentencing is simply that one can consider prior convictions, and each judge who has somebody with more than one conviction should consider it, not only may, but should consider prior convictions, give whatever weight that judge feels is appropriate, but if judges at the time of considering prior convictions also consider pending cases, and then if that pending case resulted in a conviction, one of the sentences would inevitably have been a pyramided sentence. Consequently, I don't consider pending cases on that basis.

The court then sentenced petitioner to two years' imprisonment, all but six months of which was suspended in favor of three years' probation (J.A. 2-3, 28-29).

Thereafter, pursuant to negotiations with petitioner (see Supp. App. 3, 11),[2] the government dismissed the pending mail fraud indictment and substituted a one-count information charging petitioner with possession of counterfeit certificates of deposit, in violation of 18 U.S.C. 480. Petitioner pleaded nolo

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gests that somehow [petitioner] comes before this Court tainted by virtue of a grand jury indictment where [petitioner] was not before the grand jury. [Petitioner] has never had his opportunity to tell that grand jury or a Court or a jury or anybody else in a position to make a decision in this matter what his position and his version is of that matter.

So I, in rebuttal, respectfully suggest it's not appropriate for the Government to be arguing that [petitioner] is entitled to some sort of enhanced punishment in this passport case by virtue of the fact that there is a pending grand jury indictment for mail fraud.

[2] "Supp. App." refers to the appendix to petitioner's brief on the merits.

contendere to that charge and was found guilty by the court (Davis, J.) (Supp. App. 3-15). He was sentenced to two years' probation (*id.* at 16-39), a sentence that the court characterized as "lenient" (*id.* at 39).

Thereafter, the court of appeals reversed petitioner's initial conviction on the false passport charge on the ground that certain proffered evidence should have been admitted. 641 F.2d 326 (5th Cir. 1981). Following his retrial and conviction, petitioner was sentenced by Judge Roettger, who had also presided at the first trial, to two years' imprisonment, with no portion of the sentence suspended (Pet. App. A33-A66). The court explained that it was altering petitioner's sentence from that imposed at the first trial to take into account the intervening conviction on the counterfeit certificates of deposit charge (*id.* at A42-A59). The court stated (*id.* at A42):

> [W]hen I imposed sentence the first time, the only conviction on [petitioner's] record in this Court's eyes, this Court's consideration, was failure to file income tax returns, nothing else. I did not consider then and I don't in other cases either, pending matters because that would result in a pyramiding of sentences. At this time he comes before me with two convictions. Last time, he came before me with one conviction.

The court explained the significance of this additional conviction (*id.* at A58): "At the time of the first sentencing, I just thought that [petitioner] was one of those people who couldn't see the out-of-bounds lines very clearly and didn't care too much which side of it he was on." Thus, in the court's view, this additional conviction shed new light on petitioner's character and rendered inappropriate a sentence with all but six months suspended.

3. The court of appeals affirmed petitioner's conviction and sentence (Pet. App. A1-A32). Specifically, the court held that the modification of petitioner's sentence on retrial was not motivated by judicial vindictiveness and that it comported with the guidelines for enhanced sentencing established by this Court in *North Carolina* v. *Pearce*, 395 U.S. 711 (1969). The court explained (Pet. App. A15):

> Judge Roettger followed precisely the procedural steps of *Pearce*, affirmatively stating on the record his reason for enhancing the sentence, basing that reason on objective information concerning identifiable conduct of the defendant, and making the factual data on which his action was based part of the record so that its constitutional legitimacy may be fully reviewed on appeal[.]

The court of appeals specifically rejected petitioner's argument that his conviction on the counterfeit certificates charge could not provide the basis for enhancement of his sentence because it was not "conduct on the part of the defendant occurring after the time of the original sentencing" (see *Pearce*, 395 U.S. at 726). The court of appeals stated that that argument "concerns but a part of the means, and ignores the end sought to be achieved in *Pearce*. It exalts words above substance." Pet. App. A19. The court explained (*id.* at A19-A20, A24):

> [A] rigid limitation of increased sentences to those based on misconduct occurring after the first sentencing would needlessly erase relevant information from the sentencing slate, while contributing nothing to the goal of avoiding vindictiveness.
>
> * * * * *

> The target in *Pearce* was vindictive sentencing, not defendant misbehavior between trials. No reason exists for applying a phrase in the *Pearce* guidelines to circumstances bearing no relation to the purpose of those guidelines. There is on this record no evidence whatsoever that the enhancement here resulted from vindictiveness of Judge Roettger. Nor does [petitioner] argue that it did. In such circumstances, an increased sentence neither thwarts the purpose of *Pearce* and its guidelines nor offends constitutional due process considerations.

After reviewing this Court's post-*Pearce* decisions concerning vindictive sentencing, the court of appeals concluded that "where as here the record establishes a total absence of any 'realistic likelihood' of vindictiveness, an increased sentence does not offend the Due Process Clause" (Pet. App. A26-A27).

SUMMARY OF ARGUMENT

A. The normal broad latitude given to judges in imposing sentence is constrained somewhat in the case of resentencing following a successful appeal and reconviction. In *North Carolina* v. *Pearce*, 395 U.S. 711, 723-726 (1969), this Court held that the possibility that an increased sentence on retrial could be motivated by a desire to retaliate against a defendant for challenging his conviction, which would violate due process, requires a prophylactic rule prohibiting such a sentence increase unless it is adequately explained by reasons placed on the record by the sentencing court. Despite this initial presumption of vindictiveness, *Pearce* and a consistent line of authority deriving from it make clear that the due process concern in this context is with actual vin-

dictiveness (or a defendant's realistic fear of such actual vindictiveness) in resentencing. See generally *United States* v. *Goodwin*, 457 U.S. 368 (1982). Thus, when a showing is made demonstrating a sound, nonvindictive reason for increasing the sentence over that imposed at the first trial, the presumption of vindictiveness is dispelled and the dictates of due process are satisfied.

B.1. For purposes of explaining the reason for an increased sentence and thereby dispelling the presumption of vindictiveness, it is not apparent that there should be a constitutional difference between relying on events that occur subsequent to the first sentencing proceeding and relying on earlier events that do not come to light until after the first sentence is imposed. Nevertheless, the prophylactic rule as set forth in dictum in *Pearce* limits the allowable bases for increasing the sentence to events that occur after the first trial. We submit that this apparently inflexible limitation should be treated as subject to reconsideration as different fact situations arise. The temporal limitation was not necessary to the decision in *Pearce* and was established without the benefit of briefing by the parties; it seems clear that all its ramifications were not considered by the Court at the time. Such a limitation does not advance the policies of *Pearce* and can lead to the exclusion of extremely significant sentencing information in some cases, for example, when the defendant's earlier participation in serious crimes does not come to light until after the first trial.

2. In this case, it is clear that the sentencing court's reason for imposing the increased sentence satisfies the *Pearce* rule; the court based the increase on petitioner's conviction on another charge—an

event that occurred after the first sentencing proceeding. Petitioner's argument that the *Pearce* rule allows consideration only of "conduct on the part of the defendant" (395 U.S. at 726) that occurs after the second sentencing proceeding is clearly refuted when this statement is considered in the context of the entire *Pearce* decision. *Pearce* unequivocally states that *events* occurring subsequent to the first trial appropriately, and constitutionally, may be considered in imposing a greater sentence at a retrial. Neither the rationale of *Pearce*, the other opinions in the case, nor later statements by this Court suggest that the Court intended that such "events" be limited to those involving conduct by the defendant subsequent to the first trial.

The rule proposed by petitioner would seriously interfere with sensible sentencing policy. For example, as illustrated in this case, in many instances it would prevent the sentencing court from considering a defendant's prior convictions, even for very serious crimes. This would not necessarily benefit defendants as a class; it could make courts more prone to consider unresolved charges pending at the time of sentencing. The results of the rule advanced by petitioner are particularly irrational where the defendant pleads guilty the first time, receives a more lenient sentence on that account, and then pleads not guilty at retrial after his first conviction is reversed. If the second sentencing court is limited to the sentence imposed by the first court because the increase would not be based on intervening "conduct by the defendant," the court would be required to keep its part of the bargain in imposing a lenient sentence even though the defendant did not keep his

part of the bargain by pleading guilty. See Fed. R. Crim. P. 11(e)(1)(C) and (4); *Corbitt* v. *New Jersey*, 439 U.S. 212, 223-224 (1978). In short, the proffered distinction between "events" and "conduct of the defendant" interferes with sound sentencing, does not advance the policies of due process, and is not supported by a reading of *Pearce* as a whole. Therefore, petitioner's intervening conviction—an event that occurred subsequent to his first sentencing—justifies the increase in his sentence.

3. In the particular circumstances here, it is clear beyond any doubt that petitioner's increased sentence was not motivated by vindictiveness and hence was not violative of due process. The record of the first proceeding demonstrates that the court, acceding to defense counsel's request, stated its intent not to consider the unresolved charges pending against petitioner although it always considered prior convictions to be highly relevant for sentencing. Thus, the court's invocation of petitioner's intervening conviction to increase his sentence following retrial could not be a post hoc rationalization masking a retaliatory motivation; that increase was necessary to follow the court's previously announced sentencing policy. Indeed, as the court of appeals stated (Pet. App. A24), petitioner does not even appear to contend that the sentence was motivated by vindictiveness; hence, it does not violate due process. See *Moon* v. *Maryland*, 398 U.S. 319 (1970).

ARGUMENT

THE IMPOSITION OF A HIGHER SENTENCE FOLLOWING PETITIONER'S RETRIAL TO TAKE INTO ACCOUNT AN INTERVENING CONVICTION DID NOT VIOLATE DUE PROCESS

This Court has long recognized that it is appropriate for a sentencing authority to consider a broad range of information in determining the proper sentence to impose on a convicted defendant. See generally *Roberts* v. *United States*, 445 U.S. 552, 556 (1980); *United States* v. *Grayson*, 438 U.S. 41, 45-50 (1978); *United States* v. *Tucker*, 404 U.S. 443, 446 (1972). The consideration of information extrinsic to the charged offense is necessary to advance the sentencing philosophy presently prevailing in the federal system and that of many states that "the punishment should fit the offender and not merely the crime." *Williams* v. *New York*, 337 U.S. 241, 247 (1949). Indeed, Congress had specifically provided that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense" (18 U.S.C. 3577). And this Court has stated that such character information is "[h]ighly relevant—if not essential—to [the court's] selection of an appropriate sentence." *Williams* v. *New York*, 337 U.S. at 247.

This Court has held, however, that in sentencing a defendant who has been convicted at a retrial following a successful challenge to his original conviction, the Due Process Clause places a limited restraint on the sentencing court's usual discretion to consider all relevant information and to impose the sentence that seems most appropriate on the record before it. *North Carolina* v. *Pearce*, 395 U.S. 711, 723-726 (1969). This holding derived from concern that the trial judge might act vindictively in that situation

and impose a higher sentence on a defendant to penalize him for taking an appeal or seeking collateral relief. To protect against this possibility of unconstitutional conduct, the Court laid down a "prophylactic rule" (see *Colten* v. *Kentucky*, 407 U.S. 104, 116, 118 (1972)) requiring the trial court to place on the record its reasons for imposing a higher sentence. The effect of the rule is to create a rebuttable presumption: an unexplained higher sentence on retrial will be presumed to be vindictive, and hence violative of due process, but that presumption may be rebutted by reference to the reasons affirmatively given by the sentencing court.

While recognizing that "events subsequent to the first trial that may have thrown new light upon the defendant's" character may appropriately—and constitutionally—be considered in increasing his sentence at retrial (395 U.S. at 723), dictum in *Pearce* also states that the reasons placed in the record to justify an increased sentence "must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding" (*id.* at 726). This case raises the question of what sorts of information may justify the imposition of a higher sentence following retrial and whether the narrow scope of the dictum of *Pearce* should be reconsidered. Specifically, the question here is whether the court's imposition of a higher sentence on petitioner's retrial to reflect his intervening conviction on another charge satisfies the due process concerns identified in *Pearce*. We submit that it does, and that the court's explanation of its increased sentence here plainly rebuts any presumption of vindictiveness and satisfies both the letter and the spirit of *Pearce*.

A. The Due Process Concerns Identified In *Pearce* Are Completely Alleviated When The Second Sentence Is Not Actually Motivated By Vindictiveness

The decisions of this Court dealing with the possibility of vindictive action by judges, juries, or prosecutors make clear that the due process concerns in this context are with actual vindictive action punishing a defendant for his legitimate exercise of a legal right. If such vindictiveness is not a realistic possibility in a given setting, or if the circumstances of a particular case make it unreasonable to presume a vindictive motivation, the imposition of a higher sentence or charge upon a defendant plainly does not violate the Due Process Clause.

In *Pearce*, this Court had before it two cases in which state trial judges had significantly enhanced the sentences imposed on convicted defendants after those defendants had successfully invoked post-conviction review procedures and obtained reversal of their original convictions. The Court stated that "[d]ue process of law * * * requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial" (395 U.S. at 725). The Court further stated that in order to prevent unconstitutional deterrence of a defendant's right to challenge his first conviction, "due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge" (*ibid.* (footnote omitted)). The Court concluded that a prophylactic rule was necessary to protect against the possibility of such a due process violation (*id.* at 726):

> In order to assure the absence of such a motivation, we have concluded that whenever a judge

> imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.

The adoption of such a rule was calculated to alleviate both of the due process concerns identified by the Court earlier in its opinion: a reviewing court could assess the reasons given by the sentencing court and satisfy itself that actual vindictiveness played no role in the higher sentence on retrial, and the existence of this procedure would assure defendants that there was no reason to fear that they would be punished at a retrial for having exercised their right to attack their conviction.

Petitioner apparently argues (Br. 11) that a showing that there is no realistic likelihood of actual vindictiveness in a particular case is not sufficient to satisfy the dictates of the Due Process Clause. Petitioner claims (Br. 11) that the purposes of *Pearce* are "to avoid the appearance of vindictiveness and to remove the apprehension of fear from the mind of the defendant at a time when he must decide whether to take an appeal." As noted above, however, the requirement that the sentencing judge place his reasons for the increased sentence in the record, and that they be such as reasonably to justify the difference in sentences, plainly removes any appearance of vindictiveness and ought to remove any realistic fear on the part of the defendant that his second sentence will be increased in retaliation for appealing.

Petitioner appears to argue, however, that at the time the defendant decides whether to take an appeal he ought to be free from the fear that appealing could

result in the imposition of a higher sentence (even if not actually motivated by vindictiveness), because otherwise that fear would have a "chilling effect" on his decision whether to exercise a legal right to appeal (see Pet. Br. 17). This argument is foreclosed by a consistent line of decisions of this Court.

1.a. *North Carolina* v. *Pearce* is itself inconsistent with the view that due process requires the decision to appeal to be free of a "chilling effect" caused by the bare possibility of a higher sentence on retrial. In order to guarantee a "free and unfettered decision as to whether to take an appeal" (Pet. Br. 6), it would be necessary to eliminate completely the possibility that a higher sentence could be imposed after retrial. But that position, of course, was rejected by the Court in *Pearce* when it declined to recognize a double jeopardy restriction on the second sentence[3] and instead held that a higher sentence could be imposed after retrial if it were explained by reasons that demonstrated a lack of actual vindictiveness. Moreover, in *Moon* v. *Maryland*, 398 U.S. 319, 320 (1970), the Court explicitly stated that there was "no claim * * * that the due process standard of *Pearce* was violated" because the defendant conceded that the judge in that case was not actually vindictive.[4]

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[3] Justice Harlan specifically noted in his partial dissent that the Court's analysis would burden the defendant's decision whether or not to appeal because of the possibility that he ultimately would be worse off after appealing than if he had chosen not to challenge his first conviction. 395 U.S. at 746.

[4] The Court had granted certiorari in *Moon* to consider the retroactivity of *Pearce*. The Court dismissed the writ as improvidently granted when it came to light that there was no claim of actual vindictiveness and hence no *Pearce* violation in any event.

b. The decisions of this Court in cases outside the immediate *Pearce* context show that there is no constitutional infirmity in a subsequent, *nonvindictive*, increased charge or sentence even if the possibility of such an outcome might chill or deter the exercise of a legal right.

In *Colten* v. *Kentucky*, 407 U.S. 104 (1972), this Court held that due process was not violated by the imposition of a higher sentence at the second stage of a two-tier prosecution system in which the defendant could appeal automatically from a conviction in an inferior court and obtain a trial de novo in a court of general jurisdiction. The Court explained that the possibility of vindictiveness was not inherent in the Kentucky system in the way that it was in *Pearce*. Hence, a defendant would not be deterred from appealing by the apprehension of such vindictiveness. *Id.* at 116. The Court recognized, of course, that the superior court often will have the power to impose a more severe penalty than the defendant received in the inferior court. But as long as that increased sentence is not "a vindictive penalty for seeking a superior court trial" (*id.* at 117), its imposition, and the fact that a defendant's decision to appeal might be inhibited by the risk of a higher sentence in the superior court, does not violate due process.

Similarly, in *Chaffin* v. *Stynchcombe*, 412 U.S. 17 (1973), the Court held that due process was not implicated by a higher sentence imposed by a jury on retrial. It emphasized that *Pearce* was premised on the "need to guard against *vindictiveness* in the resentencing process" (*id.* at 25 (emphasis in original)). The Court added (*ibid.*):

> *Pearce* was not written with a view to protecting against the mere possibility that, once the slate

> is wiped clean and the prosecution begins anew, a fresh sentence may be higher for some valid reason associated with the need for flexibility and discretion in the sentencing process. The possibility of a higher sentence was recognized and accepted as a legitimate concomitant of the retrial process. [395 U.S.] at 723.

Because jury sentencing posed no possibility of vindictiveness, the Court held that due process did not bar a higher sentence on retrial (412 U.S. at 26-28). Moreover, the Court specifically rejected Chaffin's argument that, quite apart from *Pearce*, due process prohibited the imposition of a harsher sentence on retrial because of the "chilling effect" the possibility of such a sentence would have on the right to appeal (*id.* at 29-35). The Court stated that *Pearce* "intimated no doubt about the constitutional validity of higher sentences in the absence of vindictiveness despite whatever incidental deterrent effect they might have * * *" (*id.* at 29).

In *Blackledge* v. *Perry*, 417 U.S. 21 (1974), the Court did find that there was a realistic possibility that a prosecutor's decision to press more severe charges on retrial would be motivated by a desire to punish the defendant for demanding a new trial. Accordingly, the Court held that such an unexplained increase in the seriousness of the charges levelled at retrial would violate due process. The Court reiterated, however, that "the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of 'vindictiveness'" (*id.* at 27). And the Court made clear that the presumption of vindictiveness that it found appropriate in *Perry* was one that could be dispelled by other facts, such as

a showing that it would have been impossible to proceed on the more serious charge at the outset (*id.* at 29 n.7).

In *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978), the Court held that it did not violate due process for the prosecutor to threaten the accused with increased charges if the accused refused to plead guilty, and to follow up on that threat when the accused insisted on his right to stand trial. This action by the prosecutor, the Court concluded, was a legitimate exercise of " 'give-and-take negotiation common in plea bargaining' " (*id.* at 362, quoting *Parker* v. *North Carolina*, 397 U.S. 790, 809 (1970) (opinion of Brennan, J.)) and suggested no element of "punishment or retaliation" (434 U.S. at 363) that would implicate due process concerns. In *Bordenkircher* the Court quite explicitly rejected the contention that due process, as delineated in *Pearce*, protects against anything more than actual vindictiveness. It stated (*ibid.*) that "the due process violation in cases such as *Pearce* and *Perry* lay not in the possibility that a defendant might be deterred from the exercise of a legal right, * * * but rather in the danger that the State might be retaliating against the accused for lawfully attacking his conviction." See also *Corbitt* v. *New Jersey*, 439 U.S. 212, 223 (1978).

Most recently, in *United States* v. *Goodwin*, 457 U.S. 368 (1982), the Court synthesized this line of cases. *Goodwin* held that a presumption of vindictiveness was not appropriate where a prosecutor filed a felony charge after the defendant, who at first had been charged only with a misdemeanor, invoked his right to a jury trial. In the absence of such a presumption, which was not appropriate because the possibility of actual vindictiveness was unlikely (*id.* at

384), the Court explained that a due process violation could be found only if "actual vindictiveness" were affirmatively demonstrated (*id.* at 380, 384).

2. In sum, from *Pearce* through *Goodwin* this Court has not wavered from the position that a due process violation exists in this context only when actual vindictiveness can be found. The presence of an actual retaliatory motivation in a particular case or a defendant's realistic fear that he will be punished for the exercise of a legal right gives rise to a constitutional violation, but where the circumstances do not indicate such vindictiveness, it is entirely permissible for a defendant to be exposed to more severe punishment than he was before he exercised that legal right—for example, by receiving a higher sentence on retrial following a successful appeal. See, *e.g.*, *Chaffin* v. *Stynchcombe*, 412 U.S. at 25. Thus, in those cases where the Court has found that there is no realistic possibility of vindictiveness inherent in the general procedure (see *Goodwin*, *Bordenkircher*, *Chaffin*, and *Colten*), the imposition of an increased charge or sentence upon the accused does not violate due process unless actual vindictiveness is shown (see *Goodwin*, 457 U.S. at 384).

In two cases, *Pearce* and *Perry*, the Court has found that the general situation poses a sufficient danger that either judges or prosecutors will seek to punish defendants for the exercise of a legal right that a presumption of vindictiveness is warranted.[5] But those decisions do not suggest any deviation from the

[5] The Court has explained that the judicial system has an institutional bias against the retrial of issues that have already been decided. Accordingly, when a defendant attacks his conviction and thereby obtains a retrial, there is an institutional pressure that might subconsciously motivate a vindictive response. *United States* v. *Goodwin*, 457 U.S. at 376-377.

basic principle that it is actual vindictiveness against which the Due Process Clause protects. Rather, they simply reflect the Court's awareness that it may be quite difficult for a defendant to prove that an action was in fact animated by a retaliatory motivation. See *Pearce*, 395 U.S. at 725 n.20. As the Court stated in *Goodwin* (457 U.S. at 373): "Motives are complex and difficult to prove. As a result, in certain cases in which action detrimental to the defendant has been taken after the exercise of a legal right, the Court has found it necessary to 'presume' an improper vindictive motive * * * in cases in which a reasonable likelihood of vindictiveness exists." But this presumption plainly is no more than a shifting of the burden of proof; the presumption may be rebutted by evidence demonstrating a nonvindictive reason for the action. *Goodwin*, 457 U.S. at 374, 376 n.8; *Perry*, 417 U.S. at 29 n.7; *Pearce*, 395 U.S. at 726. Put another way, in that situation the defendant does not have to prove affirmatively the existence of actual vindictiveness in order to defeat the imposition of a higher sentence, but he nevertheless has no grounds for complaint if a showing is made that dispels the realistic possibility of vindictiveness. The ultimate standard remains the same; there is no due process violation unless the circumstances of a particular case (taking into account the appropriate presumptions) demonstrate that the action detrimental to the accused was motivated by a desire to punish his exercise of a legal right.

B. Petitioner's Increased Sentence Demonstrably Was Not The Product Of Vindictiveness And Hence Not Violative Of Due Process

In this case, petitioner obtained a reversal of his first conviction on appeal. After a retrial, he was given what amounts to a higher sentence because, un-

like his first sentence, no portion of it was suspended. This increase, while not nearly as substantial as the sentence increases involved in *Pearce* and its companion case,[6] is sufficient under *Pearce* to create a presumption of vindictiveness; if unexplained, the sentence increase would violate due process. But there is no doubt whatsoever here why petitioner re-

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[6] Petitioner suggests (Br. 9, 16 n.10) that the sentence increase here was quite severe because the actual jail time in the sentence as imposed was increased from six to 24 months. This suggestion ignores the statutory constraints under which the sentencing court was forced to operate and the practical reality of the sentence imposed upon petitioner. In fact, once the court decided that petitioner merited a more severe sentence than he received the first time, the sentence imposed seems the most logical one for the court to have selected.

The court could not have increased the sentence by imposing another split sentence with some increase in the actual time of incarceration. Section 3651 (18 U.S.C.) provides that a split sentence may include no more than six months incarceration. Thus, in order to increase the jail time imposed on petitioner, the court was forced to give him a regular sentence without any portion being suspended. The court could have sentenced him to less than two years, of course, but such a sentence, while perhaps more severe overall, would have yielded a reduction in the total length of the sentence that the court could reasonably have considered inappropriate in light of the additional evidence of petitioner's propensity to engage in criminal conduct. Nor is the practical impact of the increased sentence on petitioner as severe as it appears at first blush. With a two-year sentence, he will first be eligible for parole after eight months and is guaranteed release on the basis of good time credits several months before the two-year sentence would expire (see 18 U.S.C. 4161). Thus, the difference in the sentences is between six months in prison and three years' probation on the one hand and a somewhat longer period in prison but a much shorter parole period, totalling two years, on the other hand.

ceived a higher sentence at retrial. The sentencing judge clearly stated that petitioner now merited a more severe sentence because he had been convicted of another crime in the interim—a circumstance that the judge had specifically noted after the first trial would merit more severe treatment if it were to occur. Thus, it is indisputable that petitioner's higher sentence was imposed for a valid reason and did not reflect any actual vindictiveness toward petitioner's exercise of his right to appeal. Accordingly, the presumption of vindictiveness has been dispelled, and no basis exists for finding a due process violation.

1. ***When an Increased Sentence Is Supported by New, Objective Information Not Known at the Time of the First Sentencing, No Presumption of Vindictiveness Is Warranted***

Under the rationale of *Pearce* and its progeny, the requirements of due process ought to be satisfied if the reasons given by the sentencing judge for the sentence increase provide a sound, nonvindictive basis for the sentence. Those reasons would demonstrate to a reviewing court that the sentencing court did not retaliate against the defendant for the exercise of a legal right and hence would undercut the validity of any presumption of vindictiveness. In particular, the requirement that the sentencing court's reasons be placed on the record subject to scrutiny by a reviewing court effectively eliminates the risk that the source of the increased sentence was a "subconscious motivation" (see Pet. Br. 11; *United States* v. *Goodwin*, 457 U.S. at 377) to punish the defendant for causing a retrial. While every factor that might ordinarily be taken into account at sentencing in the first instance is not necessarily sufficient to dispel a presumption of vindictiveness, it would seem that the

Constitution should permit any objective factual information not available to the first sentencing judge (or demonstrably not considered then for good reasons no longer applicable) to be set forth as a justification for a higher sentence on retrial. Cf. *Pearce*, 395 U.S. at 751 (White, J., concurring).

The language of the Court's opinion in *Pearce*, however, appears to place stricter limitations on the sort of newly discovered facts that may be employed to justify a higher sentence. It refers to "conduct on the part of the defendant occurring after the time of the original sentencing proceeding" (395 U.S. at 726) and "events subsequent to the first trial" (*id.* at 723). Thus, it was apparently the Court's view in *Pearce* that the Constitution would prohibit the second sentencing court from considering facts placed before it that concededly were not known to the first sentencing court, no matter how significant those facts would ordinarily be to the imposition of an appropriate sentence, if the events in question occurred prior to the first sentencing proceeding. Compare 395 U.S. at 751 (White, J., concurring).

We submit that this language in *Pearce* placing a temporal limitation on the facts that may be considered by the second sentencing court may appropriately be reconsidered by the Court.[7] It is not clear that the Court in *Pearce* intended to set an inflexible rule in this regard; rather, the language in *Pearce* can be read as setting forth a general guideline to be fleshed out by the lower courts in light of the principles of *Pearce* and lower court experience with the

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[7] The narrower question of the weight to be given to the "conduct on the part of the defendant" language is discussed in the next point (pages 29-38, *infra*).

prophylactic rule as individual fact situations come before them.

Certainly this latter approach is more consonant with the tradition that legal rules be shaped by the resolution of issues necessarily presented to the court in actual cases and controversies. Any limitation set forth in *Pearce* of the reasons that theoretically could justify a higher sentence is pure dictum.[8] In neither *Pearce* nor its companion case did the State come forth with *any* reasons to justify the sentence increase (see 395 U.S. at 726); hence, the presumption of vindictiveness that the Court held applicable necessarily required overturning the increased sentences, even if there were *no* limitation on the type of reasons that legitimately could rebut the presumption. The longstanding principle that dicta "ought not to control the judgment in a subsequent suit, when the very point is presented for decision" (*Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821)) coun-

[8] Three of the eight Justices clearly joined in this dictum. Justice White specifically noted his disagreement with it, stating that, in his view, due process permitted a sentence increase on the basis of "any objective, identifiable factual data not known to the trial judge at the time of the original sentencing proceeding" (395 U.S. at 751). Justices Douglas, Marshall, and Harlan concurred in part on the ground that the Double Jeopardy Clause prohibited any increase in sentence on retrial (*id.* at 726-737; *id.* at 744-751). These Justices did not specifically discuss the appropriate parameters of the Court's due process holding, although Justice Harlan expressed some doubt concerning the merit of a distinction between events occurring after the first trial and prior misconduct subsequently discovered (*id.* at 750 n.8). Justice Black dissented from the Court's due process holding in *Pearce*, stating that he did not believe the Constitution required any statement of reasons by the second sentencing court (*id.* at 740-743).

sels against uncritical acceptance of the precise contours of the prophylactic rule as set forth in *Pearce*. See also *Darr* v. *Burford*, 339 U.S. 200, 214 n.38 (1950); *Wright* v. *United States*, 302 U.S. 583, 593-594 (1938).

It is surely accurate to say that in *Pearce* the "possible bearing [of the prophylactic rule as stated] on all other cases [was not] completely investigated." *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) at 400. Indeed, none of the briefs in the cases addressed the question of dispelling a presumption of vindictiveness.[9] Thus, in formulating the standard set forth in *Pearce*, the Court was completely without the "sharpen[ing of] the presentation of issues" provided by the adversary process, "upon which the court so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). See also *Pennhurst State School & Hospital* v. *Halderman*, No. 81-2101 (Jan. 23, 1984), slip op. 28 & n.28 (noting that jurisdictional question implicitly decided in other cases remained open where not briefed or discussed in those cases); *Stone* v. *Powell*, 428 U.S. 465, 481 (1976).

More important, the temporal limitation suggested by the language of *Pearce* is not supported by the basis of the decision. No logical reason that advances

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[9] The focus of the litigation in *Pearce* was on the propriety of imposing an increased sentence at all. The States argued that there was no constitutional bar to such an increase. The respondents argued that in no circumstances could a sentence be increased on retrial; this argument was based primarily on the grounds that it would violate double jeopardy or unconstitutionally burden the right to appeal. See *Patton* v. *North Carolina*, 381 F.2d 636 (4th Cir. 1967). The parties did not focus on the possibility of a middle ground, namely, that a sentence increase would be permissible, but only under certain circumstances.

the goal of insuring against vindictive resentencing supports a distinction between events that actually occur after the first sentencing proceeding and events that occur earlier but are not discovered until afterward. Indeed, application of the limitation set forth in *Pearce* can lead to absurd results that could not possibly have been intended by the Court. Suppose, for example, that a defendant is convicted of burglary, a non-violent and apparently first, offense. He is sentenced to a short prison term or perhaps placed on probation. Following a successful appeal and a conviction on retrial, it is learned that the defendant has been using an alias and in fact has a long criminal record that includes other burglaries, several armed robbery convictions, and a conviction for murder committed in the course of a burglary. None of the reasons underlying *Pearce* in any way justifies the perverse result that the defendant receive no greater sentence in light of this information than he originally received when he was thought to be a first offender. Indeed, it is conceivable that a recidivist statute would *require* that he be given a higher sentence because of the prior convictions. It cannot seriously be doubted that this hypothetical situation is one where any presumption of vindictiveness that arises from a more severe sentence at retrial is convincingly dispelled, and *Pearce* ought not to prevent the imposition of such a sentence.[19]

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[19] Significantly, several courts that anticipated this Court's decision in *Pearce*, and found that there were due process constraints on the imposition of an increased sentence after a retrial, did not hold that a legitimate explanation for such a sentence was restricted to events occurring after the first trial. In *United States* v. *Coke*, 404 F.2d 836 (1968) (en banc), the Second Circuit invoked its supervisory power to establish a rule requiring a statement of reasons for an increased sentence at retrial. The court noted, however, that

Perhaps in recognition of the logical deficiencies of the *Pearce* distinction, this Court itself has indicated more recently that *Pearce* need not necessarily be construed inflexibly to exclude information that would dispel the presumption of vindictiveness simply because the information relates to events that occurred before the first sentencing proceeding. In *Goodwin*, the Court stated that the *Pearce* presumption of vindictiveness "may be overcome only by objective information in the record justifying the increased sentence." 457 U.S. at 374 (footnote omitted); see also *id.* at 376 n.8 (noting that analogous *Perry* presumption in prosecutorial vindictiveness context can be "overcome by objective evidence justifying the prosecutor's action"); *id.* at 386 (Blackmun, J., concurring in the judgment) ("prosecutor adequately explains an increased charge by pointing to objective information that he could not reasonably be aware of at the time charges were initially filed"). The Court's treatment of the issue in *Michigan* v. *Payne*, 412 U.S. 47 (1973), also strongly suggests that *Pearce* should not

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these reasons could be based upon newly discovered evidence relating to earlier events, for example, new information that showed that the defendant played a more significant role in the crime than first supposed. See *id.* at 842-843, 845-846. The court explained that "[a] defendant has no vested right in an inadequate record, at least when the inadequacy results from factors beyond the prosecution's control." *Id.* at 846. Similarly, in the companion case to *Pearce*, the district court vacated the unexplained increased sentence imposed at retrial as a violation of due process. The court stated, however, that a higher sentence would be permissible so long as "there is recorded in the court record some legal justification for it." *Rice* v. *Simpson*, 274 F. Supp. 116, 121 (M.D. Ala. 1967), aff'd, 396 F.2d 499 (5th Cir. 1968), aff'd, 395 U.S. 711 (1969). See also *United States* v. *White*, 382 F.2d 445, 449-450 (7th Cir. 1967), cert. denied, 389 U.S. 1052 (1968).

be read as placing an absolute temporal limitation on the facts that may be considered at resentencing. In *Payne*, the higher sentence was justified by the second sentencing court primarily on the basis of additional information concerning the details of the crime that were elicited at the trial before him, including the defendant's testimony and attitude toward the crime. *Id.* at 48 & n.1.[11] While this Court ultimately did not reach the question whether the explanation satisfied the strictures of *Pearce*,[12] the Court apparently considered it to be an open question (*id.* at 49).[13]

In sum, we submit that the Due Process Clause does not prohibit a court from relying upon objective information unavailable at the first sentencing proceeding, even if it relates to earlier events, in imposing an increased sentence after a retrial. For the

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[11] The affidavit of the second sentencing judge explaining his sentence is set forth in *People* v. *Payne*, 386 Mich. 84, 102-106, 191 N.W.2d 375, 384-386 (1971) (opinion of Black, J.), rev'd, 412 U.S. 47 (1973). The Michigan court's decision that the sentence was invalid rested on its conclusion that these reasons did not satisfy *Pearce* because they did not relate to conduct " 'occurring after * * * the original sentencing.' " See 386 Mich. at 94-95, 191 N.W.2d at 380-381 (quoting 395 U.S. at 726).

[12] Because the Court held that *Pearce* did not apply retroactively, it was unnecessary to consider whether the second sentence satisfied the *Pearce* standards (412 U.S. at 49).

[13] Indeed, it appears that, even shortly after *Pearce* was decided, the courts of appeals did not necessarily understand it as foreclosing the consideration of newly discovered events that antedated the first sentencing proceeding. See, *e.g.*, *United States* v. *Barash*, 428 F.2d 328, 330-331 (2d Cir. 1970); *United States* v. *Kienlen*, 415 F.2d 557, 559-560 (10th Cir. 1969); but see *United States* v. *Markus*, 603 F.2d 409 (2d Cir. 1979). See also *United States* v. *Hayes*, 676 F.2d 1359, 1364-1366 (11th Cir.), cert. denied, 459 U.S. 1040 (1982).

purposes of this case, however, it is unnecessary to resolve this issue because, as we explain below, the sentence imposed here was fully justified even under the constraints of the temporal restriction contained in the *Pearce* dictum, because it was based upon an event that occurred subsequent to the first sentencing proceeding.

2. *The Presumption of Vindictiveness Established in* Pearce *is Dispelled if the Increased Sentence Is Based upon Events Occurring Subsequent to the First Sentencing Proceeding*

Petitioner contends (Br. 5-6) that the increased sentence imposed in this case is invalid because it was not based on "*conduct on the part of the defendant* occurring after the time of the original sentencing proceeding" (395 U.S. at 726 (emphasis added)). Petitioner does not dispute, of course, that the event asserted as the justification for the increased sentence —his conviction on the false certificates charge—did occur subsequent to the first sentencing proceeding. Rather, petitioner's contention is that the conviction itself was not "conduct on the part of the defendant," and the criminal *conduct* that provided the basis for the conviction occurred prior to the first sentencing proceeding; hence, under *Pearce*, it could not lawfully be invoked to justify a higher sentence at retrial. See *United States* v. *Williams*, 651 F.2d 644 (9th Cir. 1981); *United States* v. *Markus*, 603 F.2d 409 (2d Cir. 1979). We submit that this is an unduly narrow and erroneous reading of *Pearce*.

a. *The Decisions of this Court Do Not Compel Excluding Intervening Events from Consideration by the Second Sentencing Court.* The language of *Pearce* focusing on "conduct by the defendant" cannot be taken as setting forth the exact contours of the pro-

phylactic rule without disregarding the rest of the Court's decision in that case. In particular, such a limitation is completely inconsistent with the Court's earlier unequivocal statement (395 U.S. at 723 (emphasis added; citation omitted)):

> A trial judge is not constitutionally precluded * * * from imposing a new sentence, whether greater or less than the original sentence, in the light of *events* subsequent to the first trial that may have thrown new light upon the defendant's "life, health, habits, conduct, and mental and moral propensities." Such information may come to the judge's attention from evidence adduced at the second trial itself, from a new presentence investigation, from the defendant's prison record, or possibly from other sources.

A formulation of the prophylactic rule that permits any "event" subsequent to the first sentencing proceeding to be used to justify an increased sentence, rather than only "conduct by the defendant," is certainly more consonant with the rationale of *Pearce*; it is not apparent why a presumption of vindictiveness is any more clearly dispelled when a sentencing court relies upon conduct of the defendant to justify a higher sentence than when it relies upon another, equally significant, event. See page 37, *infra*; cf. pages 25-26, *supra*. Indeed, the other opinions in *Pearce* reflect the view that the rule set forth by the Court was not limited to consideration of conduct of the defendant. Justice Douglas characterized the majority rule as allowing reference to "events subsequent to the first trial" or "information that has developed after the initial trial" (395 U.S. at 736 & n.6); Justice Black characterized it simply as "a requirement that state courts articulate their reasons" (*id.* at 741); Justice Harlan referred to "new facts

[that] develop between the first and second trial" (*id.* at 750).[14]

This Court has not had occasion since *Pearce* to address directly the question of the sort of information that could justify a higher sentence at retrial, but to the extent it has touched on the issue, its statements support the correctness of this broader interpretation of *Pearce*, which would permit consideration by the sentencing court of all events occurring after the first sentencing proceeding. In restating the rule of *Pearce*, the Court has not focused on conduct of the defendant, but rather has referred to "objective information in the record justifying the increased sentence." *United States* v. *Goodwin*, 457 U.S. at 374 (footnote omitted). And in *Blackledge* v. *Perry*, *supra*, where the Court imposed a prophylactic rule analogous to *Pearce*, the one example given by the Court of a scenario under which the presumption of prosecutorial vindictiveness would be rebutted involved no new conduct on the part of the defendant, only the occurrence of another event that significantly affected the charging decision. See 417 U.S. at 29 n.7. See also *United States* v. *Krezdorn*, 718 F.2d 1360 (5th Cir. 1983) (en banc), petition for cert. pending, No. 83-1115.[15] Accordingly, we submit that the court

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[14] Nor did any of the authorities considered by the Court in *Pearce* suggest that the reasons for justifying an increased sentence be limited to subsequent conduct by the defendant. The one case that did suggest a temporal limit on the facts that could be considered (compare note 10, *supra*), stated that it was not "inappropriate for the [second sentencing] court to take subsequent events into consideration." *Marano* v. *United States*, 374 F.2d 583, 585 (1st Cir. 1967).

[15] While prosecutors are public officials, their function in an adversary system lends some credence to the possibility that they may sometimes act with an improper motivation. This

of appeals correctly held (Pet. App. A19-A24) that the phrase "conduct of the defendant" should not be read as an exclusive, inflexible requirement of the *Pearce* rule. Bearing in mind this Court's repeated injunction that " 'the language of an opinion is not always to be parsed as though we were dealing with language of a statute' " (*CBS, Inc.* v. *FCC*, 453 U.S. 367, 385 (1981), quoting *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 341 (1979)), *Pearce* should be read as allowing an increased sentence to be justified on the basis of any event occurring subsequent to the first sentencing proceeding.[16]

b. *Limiting Consideration of Subsequent Events to Conduct by the Defendant Interferes with Sensible Sentencing Policy Without Advancing the Purposes*

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is not true of judges, and the Court has noted that "[t]he integrity of the judges, and their fidelity to their oaths of office" ordinarily provides "adequate[] assurance" that their sentencing decisions are not based on impermissible factors. See *United States* v. *Grayson*, 438 U.S. at 54. Therefore, the latitude given to judges with respect to justifying an increased sentence ought to be, if anything, greater than that given to prosecutors.

[16] As the court of appeals stated (Pet. App. A23 n.6), it is likely that the Court in *Pearce* assumed in formulating its rule that all conduct by the defendant that had already occurred would have been considered at the first sentencing proceeding. By the same token, the Court may have assumed that all events relevant to the resentencing would involve conduct by the defendant. Because the litigation of the case did not focus on the due process question, the Court did not have the benefit of briefing by the parties on this issue, which might have pointed out some examples, such as the instant case, in which the Court's "conduct" formulation would lead to a result at odds with the principles of *Pearce*. Thus, a failure to focus exclusively on, and blindly follow, the "conduct" formulation of *Pearce* does not require any divergence from the intent of the *Pearce* Court.

of the Due Process Clause. The distinction petitioner seeks to draw between conduct of the defendant and other significant events "needlessly erase[s] relevant information from the sentencing slate, while contributing nothing to the goal of avoiding vindictiveness" (Pet. App. A19-A20). The situation presented here is a perfect illustration of the problem. A defendant's prior criminal record is surely one of the most significant items of information for a judge to consider in imposing an appropriate sentence because of the guidance it gives on the defendant's propensity to violate the law. Thus, this Court has recognized that sentencing courts appropriately draw "sharp distinctions * * * between first and repeated offenders." *Williams* v. *New York*, 337 U.S. at 248. Requiring a court to ignore a conviction can substantially defeat the goal recognized in *Pearce* (395 U.S. at 723) of having the punishment fit the offender. In *United States* v. *Williams*, *supra*, for example, the court of appeals' strict adherence to the "conduct" formulation of *Pearce* meant that the court sentencing Williams for bank robbery was unable to increase his sentence on retrial to take into account an intervening first degree murder conviction.

The deleterious effect of excluding such relevant information from the sentencing process goes beyond the windfall benefit that some defendants would receive in the form of unduly lenient sentences. It can also have a harmful effect on defendants as a class. Although some judges, like Judge Roettger in this case, do not take pending charges into account in sentencing, there is no prohibition against considering them. See, *e.g.*, *Williams* v. *New York*, 337 U.S. at 244; *United States* v. *Madison*, 689 F.2d 1300, 1313-1315 (7th Cir. 1982). If petitioner's position were accepted that intervening convictions cannot be con-

sidered, some of these judges might decide to consider the pending charges at the time of the first sentencing to prevent the defendant from escaping without any consideration of the conduct underlying the intervening conviction. *Cf. United States* v. *Goodwin*, 457 U.S. at 379 n.10; *Colten* v. *Kentucky*, 407 U.S. at 119.[17] It certainly appears from the record that if

[17] Petitioner argues (Br. 16-17) conversely that the decision below permits improper pyramiding of sentences because the conviction in this case could be taken into account in the sentencing on the false certificates charge. Even if this were so, there would be nothing improper about it because each sentence would reflect the information before the sentencing court at the appropriate time. In fact, however, petitioner's contention assumes that the second court would ignore the fact that the outstanding conviction was pending on appeal and subject to reversal. Petitioner took much greater note of this fact at the sentencing hearing itself than he does in his brief, as counsel repeatedly called to Judge Davis's attention the fact that an appeal was pending and that petitioner's conviction might well be reversed. See Supp. App. 31-32; see also *id.* at 11, 17, 35. Whether or not Judge Davis was influenced by the pendency of an appeal, it seems fairly clear that he did not give petitioner a more severe sentence because of his passport conviction. The court characterized the sentence as "lenient" and, indeed, appears to have dealt leniently with petitioner partly because petitioner was subject to another sentence on the passport charge (see Supp. App. 39). Thus, petitioner's fear of improper pyramiding is groundless. Indeed, if he had truly been concerned about this possibility, it was within petitioner's power to take steps to avoid it. At the time of the first sentencing hearing, the false certificates charge had been pending for more than a year on a continuance sought by petitioner (see J.A. 25-26); petitioner could have sought to enter his nolo contendere plea earlier and avoided any potential for "pyramiding."

In fact, petitioner suggests a shell game that would avoid all consideration of prior convictions. He would have Judge Roettger not consider the false certificates charge because it

petitioner were to prevail here and this fact situation were to arise again, Judge Roettger would be inclined to depart from his previous policy and would increase the severity of the sentence based on pending charges (see Pet. App. A44, A54-A55). From the perspective of good sentencing practice, it is clearly preferable to allow the court to impose the sentence deemed appropriate on the basis of the full record before it, and an intervening conviction surely should be a factor that may be considered. See *United States* v. *Pacelli*, 521 F.2d 135, 141 n.6 (2d Cir. 1975), cert. denied, 424 U.S. 911 (1976). See generally *Pearce*, 395 U.S. at 723; Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 Mich. L. Rev. 1001, 1053, 1060-1061 (1980).

Another situation in which the distinction drawn by petitioner leads to serious problems of irrational sentencing is where the defendant's first conviction is pursuant to a guilty plea. It is by now well recognized that it is a common and unobjectionable practice for judges to exercise leniency in sentencing defendants who plead guilty; this practice can ease court congestion by encouraging guilty pleas. Thus, the Court held in *Bordenkircher* v. *Hayes*, *supra*, that a prosecutor's threat to increase the charges if the defendant did not plead guilty was a permissible plea bargaining tactic that furthered the prosecutor's legiti-

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had not yet come to trial; have Judge Davis not consider the passport conviction because it might be reversed on appeal; and have Judge Roettger not consider on retrial the false certificates conviction because of *North Carolina* v. *Pearce*.

mate interest in persuading the defendant not to go to trial (see 434 U.S. at 364). With respect specifically to sentencing, the Court has approved a statutory scheme that made a less severe penalty for homicide available only to defendants who plead guilty. *Corbitt* v. *New Jersey*, *supra*. The Court there reiterated that the government has a "legitimate interest" (439 U.S. at 222) in encouraging guilty pleas, and it affirmed the "constitutional propriety of extending leniency in exchange for a plea of guilty and of not extending leniency to those who have not demonstrated those attributes on which leniency is based" (*id.* at 224 (footnote omitted)). In short, "it is not forbidden to extend a proper degree of leniency in return for guilty pleas" (*id.* at 223). See also *Roberts* v. *United States*, *supra* (leniency for cooperating with government); *Brady* v. *United States*, 397 U.S. 742, 751-753 (1970).

Given this recognized disparity in sentences meted out to otherwise similarly situated defendants depending upon whether or not they plead guilty, it is clear that petitioner's reading of *Pearce* seriously interferes with the sentencing process. It enables a defendant who initially receives a lenient sentence because of a guilty plea to retain the benefit of that lenient treatment at a retrial even though the defendant elects to go to trial. The sentencing court must keep its part of the implicit "bargain" even though the defendant abandons his part of it. See *Pearce*, 395 U.S. at 742-743 (opinion of Black, J.); Aplin, *Sentence Increases on Retrial After* North Carolina v. Pearce, 39 U. Cin. L. Rev. 427, 462-463 (1970). Cf. Van Alstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant*, 74 Yale L.J. 606, 620 (1965) (recognizing practice of leniency for guilty pleas but arguing nonetheless (pre-*Pearce*) for blan-

ket prohibition on increased sentence following retrial).[18]

It should be apparent that an increased sentence in either of these situations—either to account for an intervening conviction or for the defendant's decision to abandon his guilty plea and to go to trial the second time—poses no threat to the due process principles embodied in *Pearce*. In each case, there is a strong, nonvindictive reason for the sentence increase that effectively dispels the possibility that it was motivated by a desire to retaliate against the defendant for exercising his right to appeal. Accordingly, any presumption of vindictiveness in such situations should be considered rebutted, and the enhanced sentence should be valid.[19]

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[18] Under federal practice, a defendant may enter a bargain in which his plea of guilty is explicitly conditioned upon imposition of a specified sentence and may be withdrawn if the court does not agree to be bound by that specification. Fed. R. Crim. P. 11(e)(1)(C) and (4). Particularly in the case of a sentence based upon such an agreement, it would be absurd to say that a defendant who thereafter gets his conviction set aside, stands trial, and is reconvicted cannot be given a higher sentence.

[19] In *Simpson* v. *Rice*, the companion case to *Pearce*, the defendant had pleaded guilty at his first trial and pleaded not guilty at his second trial. Thus, it might be argued that *Pearce* holds that a defendant's decision to change his plea from guilty to not guilty can never be a basis for increasing his sentence. But an examination of the factual context indicates that *Pearce* should not be read so broadly. The State made no effort to justify the substantial increase in Rice's sentence. Hence, the Court did not consider whether the leniency of the first sentence on account of a guilty plea could justify an increased sentence, and it was entitled to rely on the district court's finding that the sentence was in fact vindictive. See 395 U.S. at 726. Significantly, Justice Black, who

Indeed, a lack of vindictiveness is similarly shown in the case of any intervening event that provides a sound justification for the sentence increase. Accordingly, we submit that consideration of *Pearce* as a whole compels the conclusion that the "conduct" formulation set forth at the end of the opinion cannot be regarded as the definitive statement of the prophylatic rule. Rather, as the earlier part of the opinion indicates, *Pearce* permits the presumption of vindictiveness to be rebutted by reasons placed on the record by the sentencing court as long as they concern relevant events that occurred subsequent to the first sentencing proceeding and reasonably account for the increase in the sentence (see 395 U.S. at 723). Because it is undeniable that the court here based its increased sentence on petitioner's intervening false certificates conviction—an event that occurred subsequent to the first trial—the sentence is plainly valid under *Pearce*.[20]

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argued vigorously that a defendant's change of plea could, as a general rule, justify a less lenient sentence (*id.* at 742-743), stated that he would nevertheless affirm in *Rice* on the basis of the district court's factual finding of the existence of a retaliatory motivation (*id.* at 739).

[20] The senselessness of the distinction proffered by petitioner is perhaps best illustrated by pointing out that the enhancement here does literally satisfy the "conduct" formulation of *Pearce*. Because the trigger for the increased sentence was petitioner's nolo contendere plea, the sentence can be said to be based upon "identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding" (395 U.S. at 726). Obviously, it is absurd to have a rule that would allow an increase in petitioner's sentence in this case because of his plea, yet prohibit it if he had gone to trial and been convicted on the false certificates charge.

3. *The Unusual Facts of this Case Demonstrate Beyond Doubt that Petitioner's Increased Sentence Was Not Motivated by Vindictiveness*

At the first sentencing proceeding in this case, petitioner's counsel specifically requested that the court not consider the pending counterfeit certificates charges in determining petitioner's sentence because he had not yet had the opportunity to respond to those charges (J.A. 26). The court readily acceded to that request, explaining that it was its general policy not to consider pending cases, whereas it did believe that the sentencing court "should consider prior convictions" (*ibid.*). At the second sentencing proceeding, after petitioner had been convicted on a counterfeit certificates charge, the court made clear that, in accordance with its standard sentencing policy, it was going to take into account the intervening conviction, which called for an increase in petitioner's sentence (Pet. App. A42). It cannot reasonably be argued that this increase violates the Due Process Clause.

First, as the court of appeals noted (Pet. App. A31), petitioner wishes to have his cake and eat it too. He wants to be able to argue that the sentencing court should not consider his false certificates offense at the first trial because it is premature to do so when the charges are still pending, yet still argue that the offense should not be considered at the second trial because the conduct underlying the intervening conviction occurred before the first trial (and presumably should have been considered then (see Pet. Br. 9)). Under petitioner's view, there is never an appropriate time to consider this manifestly relevant information.

More important, the sentence satisfies due process because it plainly is not the result of vindictiveness.

The court's explanation for the increased sentence clearly establishes a reasonable, nonvindictive basis for the sentence increase. Nor can it even be suggested that this reason is merely a pretext for imposing what is actually retaliation against petitioner for appealing. The court's justification for the increased sentence effectively appears in the record of the *first* sentencing proceeding—before the appeal was taken—because the court there stated its policy that it would not consider pending charges in imposing sentence but would feel compelled to consider a conviction if one were entered. It is difficult to imagine a scenario that would more effectively rebut a presumption of vindictiveness.[21] Indeed, as the court of appeals stated (Pet. App. A24), petitioner does not even appear to contend that the increased sentence was motivated by vindictiveness.[22] Therefore, *Moon* v. *Maryland*, *supra*, sug-

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[21] For example, if there were a statute barring sentencing courts from considering pending allegations, but requiring them to enhance sentences to account for prior convictions, it could not seriously be contended that an increased sentence on retrial pursuant to this statute would be vindictive or violative of due process. In light of Judge Roettger's announced customary sentencing policy, which is stated in the record of the first sentencing proceeding, this case is essentially indistinguishable from one involving such a hypothetical statute.

[22] Petitioner does suggest (Br. 11 n.6) that the transcript of the second sentencing proceeding "reveals strong negative feelings against the Petitioner" on the part of the district court. The type of "negative feelings" discerned by petitioner, however—the alleged displeasure of the district court with the sentence imposed upon him as a result of the intervening false certificates conviction—has nothing to do with the vindictive retaliation for taking an appeal against which *Pearce* was designed to protect. And, as noted above (note 6, *supra*), the

gests that there can be no due process violation here. In sum, regardless of how the general prophylactic rule is stated, the circumstances of this case unequivocally demonstrate that the sentence challenged here was based upon relevant, constitutionally permissible criteria and did not violate due process.

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length of the sentence actually imposed by the court provides no suggestion of vindictiveness.

Moreover, at the sentencing proceedings on which petitioner relies (Br. 11 n.6), petitioner's counsel apparently eschewed reliance on the type of vindictiveness with which *Pearce* was concerned. He suggested that his objection to consideration of the intervening conviction was not because he thought that the court intended to penalize petitioner for going to trial (Pet. App. A45). In addition, the following exchange occurred (Pet. App. A50-A51 (emphasis added)):

> [DEFENSE COUNSEL:] The only other thing that I would like to add is that in the input to the update to the PSI that was presented to Your Honor a couple of days ago by Mr. Schwartz, probation officer, there was another comment by Mr. Hammer that [petitioner] is believed involved, I think it said, in numerous frauds around the State. I'd ask that particular comment be striken [*sic*], not considered just for the record. *I know Your Honor won't* but if they want Your Honor to consider other frauds let them prove the other frauds. You just can't make that statement in a PSI, and I ask that that be striken [*sic*].
>
> THE COURT: I certainly won't consider it.

Thus, defense counsel at the time of the hearing apparently did not believe that the court harbored any retaliatory motivation or animus toward petitioner, and the record clearly shows that it did not.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 83-173

In The
Supreme Court of the United States
October Term, 1983

—o—

MILTON R. WASMAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

—o—

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

—o—

REPLY BRIEF FOR PETITIONER

—o—

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ARGUMENT

I. The goal of Pearce was to take vindictiveness and the fear of vindictiveness out of the appeal and re-sentencing process.

In *North Carolina v. Pearce*, 395 U.S. 711 (1969), this Court laid to rest the claim that double jeopardy

always precludes an enhancement of sentence following re-trial after a first conviction is reversed on appeal. Contrary to the suggestion of the Respondent (Br. 15), the Petitioner is not, in this case, asking this Court to re-visit the double jeopardy aspects of *Pearce*. This case deals specifically with what types of intervening action may give rise to an enhanced sentence.

Respondent suggests that this Court, in *Pearce* and subsequent cases, was trying to protect against actual vindictiveness from playing any role in the sentencing process. (Br. 13-20). It is clear that the elimination of vindictiveness from the re-sentencing process is the key. But the difficulty comes about in a defendant's ability to prove that the trial judge was acting out of vindictiveness when he increased the defendant's sentence following a successful appeal and subsequent re-trial. As this Court pointed out, subconscious motivations may come into play. *United States v. Goodwin*, 457 U.S. 368, 102 S. Ct. 2485, 2491. (1982). How does a defendant prove that a judge was subconsciously motivated when the judge himself may not even realize that he was?

In *Pearce*, this Court clearly indicated not only that due process requires that vindictiveness must play no role in the re-sentencing process but also that:

> since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge. [footnote omitted].
>
> 395 U.S. at 725.

This court then went on to state the prophylactic rule at issue here including the language that to enhance the trial judge must point to conduct on the part of the defendant occurring after the first sentencing hearing. Clearly that rule and the language used was designed to carrying out the due process concerns discussed immediately above its pronouncement. And rightly so. If between the first and second sentencing hearings, the defendant commits no new bad act, there is no need for enhancement. (See Petitioner's Opening Brief, pp. 13-17 and Section II *infra*).

II. To exclude from consideration an intervening conviction based on pre-existing conduct does not interfere with the sentencing process or allow a defendant to receive an undue benefit

The Respondent, in its brief, fears that to adopt the Petitioner's argument would exclude key information from consideration at sentencing resulting in the defendant's receiving an undue benefit (See e.g., Br. 26, 35-36). To see that these concerns are unwarranted, it is only necessary to look to the facts of this case.

Petitioner had two indictments pending, one involving obtaining a passport using a false name in violation of 18 U.S.C. §1542 and another charging mail fraud (18 U.S.C. §1341). The passport case went to trial and a conviction resulted. (J.A. 2-3). Following sentence, an appeal was taken. During the pendancy of that appeal, the Petitioner, through negotiations, resolved the mail fraud case when that indictment was dismissed and replaced by a misdemeanor information charging possession of false certificates of deposit. (18 U.S.C. §480). To that information, the Petitioner pled *nolo contendere*

(See appendix to opening brief, App. 1-15) and was given a probationary sentence. (App. 16-39). At the time of sentence in that misdemeanor case, the district judge (the Honorable Edward B. Davis) was able to and did take into account the complete criminal record of the Petitioner including the passport conviction then pending on appeal. (App. 39). Thus, a United States District Judge set a sentence for the Petitioner with both the passport and false certificates convictions before him for consideration. That he arrived at a probationary sentence is, or should be, of no consequence. That judge clearly had the ability to sentence the Petitioner to whatever he deemed appropriate under the law.

To preclude Judge Roettger (the passport case) from also considering the two convictions because the false certificates case facts pre-date his first sentencing of the Petitioner does not interfere with the sentencing process but rather merely removes from it an improper pyramiding of sentences.[1]

In attempting to further its claim that Petitioner is in error in his position, the Respondent posits the situation of a defendant who pled guilty and received a lenient sentence because of it, and then "retain[s] the benefit of that lenient treatment at a retrial even though the defendant elects to go to trial." (Respondent's Br. 36). Respondent does not say how that hypothetical defendant

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[1] At footnote 20 of its brief (p.38), Respondent tries to say that the false certificates case is separate and apart from the mail fraud case. Clearly, that is not the case as the trial attorney for the Government agreed, based upon good faith negotiation, presumably having benefit to both sides, to dismiss the mail fraud indictment and file instead the misdemeanor false certificates information (App. 1-15).

obtains his trial after having pled guilty but, in any event, it would seem clear that should he withdraw his plea and go to trial, the sentence to be imposed if conviction results need not be limited to the sentence imposed as part of the bargain that the defendant broke.

Additionally, Respondent postulates that if intervening convictions based upon pre-existing facts cannot be considered on re-sentencing, judges may "decide to consider pending charges at the time of first sentencing to prevent the defendant from escaping without any consideration of the conduct underlying the intervening conviction." (Respondent's Br. 33-34). But that statement falls from its own weight. Clearly the defendant will not "escape without any consideration of the conduct underlying the intervening conviction." That conduct will be considered and it will be considered by the person best able to give that conduct its fair weight. It will be considered by the judge who presided at the trial that resulted in that intervening conviction. That judge, as did Judge Davis here, will be fully able to consider the facts and make out a proper sentence. On the other hand, if a charge pending at the time of first sentencing results in a dismissal, then clearly the fact of the charge should not be considered for any purpose. Thus, the procedures of Judge Roettger and others like him of not considering pending charges at sentencing need not be altered. No defendant will escape punishment when those charges result in conviction.

At page 39 of its brief, Respondent argues that under the Petitioner's view there is never an appropriate time when the information about the false certificate conviction should be considered. That is not so. It should

have been and was considered when the Petitioner was sentenced in that case. Petitioner does not contend that in no case should an enhancement of sentence be permitted following re-trial and re-conviction. But where, as here, the Petitioner did nothing between the first and second sentencing hearings except to resolve a pre-existing factual situation in court by plea for which he was duly sentenced, enhancement is improper.

CONCLUSION

For the reasons set forth in his opening brief and the additional comments contained herein, the Petitioner respectfully requests that the judgment of the Court of Appeals should be reversed and the case remanded to the district court for re-sentencing before a different district judge.

Respectfully submitted,

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March 1984

No. 83-173-CFY
Status: GRANTED

Title: Milton R. Wasman, Petitioner
v.
United States

Docketed:
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for the Eleventh Circuit

Counsel for petitioner: Moskowitz, Jay R.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Aug 1 1983	G	Petition for writ of certiorari filed.
2	Jun 15 1983		Applicaton for stay filed.
3	Jun 20 1983		Response requested - Due June 24, 1983.
4	Jun 24 1983		Response received.
5	Jun 27 1983		Application for stay granted by Powell, J.
7	Sep 7 1983		Order extending time to file response to petitior until October 8, 1983.
8	Oct 11 1983		Brief of respondent United States in oppcsition filec.
9	Oct 12 1983		DISTRIBUTED. October 28, 1983
10	Oct 31 1983		Petition GRANTED.
			**********
12	Dec 6 1983		Order extending time to file brief of petitioner on the merits until December 22, 1983.
13	Dec 22 1983		Brief of petitioner Milton R. Wasman filec.
14	Dec 22 1983		Joint appendix filed.
15	Jan 3 1984		Record filed.
16	Jan 3 1984		Certified original record on appeal (Box) recievec.
17	Jan 20 1984		Order extending time to file respondent's brief on the merits until February 10, 1984.
18	Feb 10 1984		Brief of respondent United States filed.
19	Feb 14 1984		SET FOR ARGUMENT. Tuesday, March 20, 1984. (4th case)
20	Feb 15 1984		CIRCULATED.
21	Mar 12 1984	X	Reply brief of petitioner Milton R. Wasman filed.
22	Mar 20 1984		ARGUED.